Supreme Court, U. S.
FILED
JUL 14 1972
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1972

No. 71-1043

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals, State of New York
Petition for Certiorari filed March 1, 1972
Certiorari granted May 15, 1972

APPENDIX

IRVING ANOLIK and
JOEL M. WEINBERG
Attorneys for Petitioner
225 Broadway
New York, New York 10007
732-3050

(5096) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

TABLE OF CONTENTS

Appendix

Page

Certified Copy of Complaint and Endorsements 1a

Transcript of Proceedings (September 16, 1969) 2a

Transcript of Proceedings (September 17, 1969) 103a

Colloquy (October 27, 1969) 165a

Decision (November 10, 1969) 175a

Stipulation Dispensing with Reproducing of Exhibits and Minutes of Adjournment 177a

Order of Appellate Term Appealed From With Dissenting Memorandum 179a

Opinion of the Court of Appeals of the State New York (Filed December 1, 1971) . . . 181a

Order of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting . . . 185a

Witnesses

Arthur H. Goldberg:
  Direct 10a
  Cross 12a

Contents

Page

Charles Smyth:
- Direct 18a
- Cross 29a

Parker Tyler:
- Direct 53a
- Cross 63a

Charles Winick:
- Direct 74a
- Cross 81a

Thomas Phillips:
- Direct 104a
- Cross 108a

Saul Heller:
- Direct 132a
- Cross 137a

Exhibits

Exhibit No.	Description	In Evi.	Printed at
People's			
1	3 reels of film	29a	*
Defendants'			
A	Book	71a	*

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Transcript of Proceedings

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2B3, COUNTY OF NEW YORK

- -

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SAUL HELLER, et al.,

Defendants.

- -

Docket Nos.
B19858-B19859
B19860

Charges:
235.05

Trial.
Sentence.

COURT REPORTER'S MINUTES

New York, New York
September 16 and 17, 1969

Before:
HON. WILLIAM E. RINGEL, (Presiding)
HON. BERNARD MOLDOW,
HON. MORTON R. TOLLERIS,

Judges, Criminal Court.

Appearances:
(Defendants)
For the People:
    RICHARD BECKLER, Esq.
    Assistant District Attorney,
    County of New York.

For the Defendants:
    JOEL H. WEINBERG, Esq.
    1465 Broadway
    New York, New York

Jerome Oppenheimer, CSR
Official Court Reporter

[2]INDEX

WITNESSES AND EXHIBITS

WITNESS	DIRECT	CROSS
Arthur H. Goldberg	9	12
Charles Smyth	20	35
Parker Tyler	67	81
Charles Winick	94	104
Thomas Phillips	136	140
Saul Heller	173	179

EXHIBITS

PEOPLE'S	DEFENDANT'S	DESCRIPTION	PAGE
1		Plastic container with 3 reels of movie film	35
	A	Book, entitled Sex Psyche et cetera In The Film	92

Transcript of Proceedings

[3]September 16, 1969

Court Officer Joseph Hughes: Calendar Number 62, Docket B19858, Saul Heller, Susan Epstein, and Mark Kern, charge obscenity by Deputy Inspector Charles Smyth.

The Defendant's Counsel: (giving appearance) Joel H. Weinberg, 1465 Broadway.

The District Attorney: Before trial commences, the People have a motion to make.

The Presiding Judge: Sure.

The District Attorney: Before trial commences, the People have a motion to make as to two of the defendants present before the Court.

The Presiding Judge: Yes?

The District Attorney: As to the defendant Susan Epstein and the defendant Mark Kern, the District Attorney having conferred with their defense counsel will move to dismiss the charges against those two defendants, in view of the fact that we would be unable to prove their guilt or knowledge beyond a reasonable doubt.

The Presiding Judge: Heller and Epstein?

[4]The Defendant's Counsel: No, Kern and Epstein.

The District Attorney: Kern and Epstein, Your Honor.

The Presiding Judge: Kern, all right. Kern and Epstein, dismissed, motion of the D.A.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: All right.

The Defendant's Counsel: Your Honor, the defendant Heller is ready for trial. Prior to trial, in accordance with my discussions had with Mr. Conboy, Mr. Weinstein and Mr. Beckler, I have reserved all motions for this trial court, and I would like to be heard on motion to dismiss.

The Presiding Judge: I don't know what that means, Counsel, reserved all motions to this trial. If you have any interlocutory motions, like motions to suppress, it is better practice, and preferable as far as this bench is concerned, that you clear the decks of those things before we actually go into trial.

[5]The Defendant's Counsel: I would ordinarily —

The Presiding Judge: The Code of Criminal Procedure so provides, and I will not, this Court will not be bound by any agreement you make with the D.A., or anybody else.

The District Attorney: Your Honor, it was my understanding that this case was ready for trial today.

The Presiding Judge: That was my understanding. If you have any understanding to the contrary, I would like to see it in writing.

The Defendant's Counsel: I have no such understanding to the contrary, Your Honor, but within the confines of the Constitution, and let me just finish one sentence, Your Honor, please, that the motion in this type of action is preferable at the time of trial because there is no modus operandi--

The Presiding Judge: What provision of the United States Constitution says that?

The Defendant's Counsel: The provision as follows, that there is no effective modus operandi [6] in the Code of Criminal Procedure which is built in, in the case of a deprivation of a right, where a defendant can make a motion to suppress and then get a speedy trial within the regular purview of the law as it stands now.

Accordingly, I would ask that I be heard on this motion even if it is denied.

Judge Moldow: Is there a motion to suppress?

The Defendant's Counsel: It is to dismiss.

Judge Moldow: To suppress?

The Defendant's Counsel: To dismiss.

The Presiding Judge: On what ground?

The Defendant's Counsel: The ground that the statute is unconstitutional, and that there has been prior, no prior judicial determination in an adversary proceeding prior to this trial, number one.

Number two, that there are no papers on record here which would reflect any adverse determination even by affidavit.

[7] The Presiding Judge: I don't know what that means, no adverse, I don't understand that.

The Defendant's Counsel: All right. The courts of this country have held, in some states--

Judge Moldow: Counsel, Let me--

The Defendant's Counsel: May I submit a memorandum of law?

Judge Moldow: Just a minute. Why can't these applications be made at the end of the People's case?

The Defendant's Counsel: I will make them at the end of the People's case.

The Presiding Judge: All right, nothing wrong with that.

The Defendant's Counsel: May I just submit a memorandum of law for the Court?

The Presiding Judge: Yes, we are always happy to read memorandum of laws. We don't get too many of them.

(Defendant's counsel hands to the Court.)

The Presiding Judge: Yes, sir?

The Defendant's Counsel: The defendant is ready for trial.

[8]The Presiding Judge: All right, let's go on, start the trial and see what we develop, and make your motions accordingly.

The District Attorney: The People are ready and call Inspector Smyth to the stand--excuse me, Justice Goldberg to the stand.

The Defendant's Counsel: Before Judge Goldberg, may I also hand up to the Court, although it is in my handwriting, a decision that came out of the Federal Court yesterday with regard to the memorandum of law? I have spoken to the District Attorney --

The Presiding Judge: What case is that?

The Defendant's Counsel: The name of the case is Natale v. The Municipal Court of the City and County of San Francisco, which was decided August 29th, by U.S. Federal Judge Napoli of San Francisco.

Judge Moldow: That a motion picture case?

The Defendant's Counsel: Absolutely a motion picture case, and I have a Xerox copy of the Variety article which I clipped out of Variety, [9] plus my telephone communication with the Judge.

The Presiding Judge: Did Variety publish it in English this time?

The Defendant's Counsel: Yes, I think they did.

The Presiding Judge: They have a language of their own, if I remember correctly.

Judge Moldow: Would you raise your right hand? (Witness complies) Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Be seated. Name, address, and occupation? Keep your voice up.

The Witness: Arthur H. Goldberg, 100 Centre Street, New York, New York, 10013. I am a Judge of the Criminal Court of the City of New York.

JUDGE ARTHUR H. GOLDBERG, witness called on behalf of the People, occupation Judge of the Criminal Court, City of New York, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the District Attorney:

[10]Q. Judge Goldberg, on July 31st, 1969, at approximately four o'clock that afternoon, did you have an occasion to see a movie entitled A Blue Movie? A. I did. As I recall it, the time was 3:40 p.m.

Q. Where did you see this movie at? A. At the Garrick Theatre on Bleeker Street in Greenwich Village, New York.

Q. After having viewed this movie, did you have an occasion to sign any arrest warrant for any parties involved in that movie? A. I did. I saw the entire movie, I think it ran from 3:40 until about 5:15 or 5:20, and then a few minutes after that, I think it was about 5:25, my recollection, p.m., I signed a warrant of arrest.

Q. Whom did you sign the arrest warrant for, was it in anyone's name, Your Honor? A. As I recall it, those were John Doe and Jane Doe names.

Q. What was your — And why did you sign these arrest warrants? A. I had seen the film, and it was, and is my opinion that that film is obscene, and was obscene [11] as I saw it then under the definition of obscene, that is in quotes, section 235.00 of the Penal Law.

The Presiding Judge: Was there an affidavit submitted to you by somebody?

The Witness: There was an affidavit, the complaint--

The Presiding Judge: An affidavit complaint?

The Witness: The typical--the complaint in this case signed by Inspector Smyth, and he swore to that complaint.

The Presiding Judge: And based on that, you signed the warrant, that also was included as the basis for your signing the warrant?

The Witness: That is correct.

The Presiding Judge: That was--

The Witness: (interjecting) - that the affidavit was before me right after the movie, it was submitted to me.

The Presiding Judge: And you signed--the warrant was an arrest warrant?

The Witness: That is correct. I think it was a formal bench warrant, I struck out the word [12] clerk and put my name on it.

The Presiding Judge: All right.

Q. And what time did you sign these warrants, sir? A. That was at 5:25, that is my recollection, and that has been refreshed by looking at the --

Q. (interjecting) Do you have the warrant here? A. The warrant or copy of the warrant, but it is my independent recollection, at any rate, I remember it was at 5:25 or 5:30 , no later.

The Presiding Judge: Yes.

Q. That was on the same date? A. Yes, immediately after.

The District Attorney: I have no further questions of the witness at this time. Any cross?

The Defendant's Counsel: Oh, yes.

Cross-Examination by the Defendant's Counsel:

Q. Your Honor, on the day that you signed the search warrant, you went to the Garrick Theatre, is that correct? A. That is correct.

Q. What caused you to go to the Garrick Theatre? [13]A. Well, the District Attorney had asked me to go, and Inspector Smyth was also present, and I agreed to accompany them.

Q. Now, when you say the District Attorney asked you to go, was there any formal papers that the District Attorney submitted to you to go to the theatre?

Judge Moldow: You mean motion papers?

The Defendant's Counsel: Written papers of any sort, Your Honor?

The District Attorney: Your Honor, I would object to that question as not being clear exactly.

The Presiding Judge: Well, did you go pursuant to some court order or direction or written request by the District Attorney?

The Witness: No, there was an oral request by Assistant District Attorney, Richard Beckler.

Q. Now, when Richard Beckler made that oral request, was that in the presence of Detective (sic) Smyth?

The Presiding Judge: Inspector Smyth.

The Defendant's Counsel: I am very sorry.

Q. (continuing) Inspector Smyth? A. No, it was not.

[14]Q. As a result of this request, did Mr. Beckler go with you to the Garrick Theatre? A. No, he didn't. He told me that he had seen it the day before.

Q. And, Mr. Beckler turned over to you no written documents asking you to go to the Garrick Theatre, is that correct? A. That is correct.

Q. Now, when you got to the Garrick Theatre, you went there with Inspector Smyth, is that correct? A. That is correct.

Q. Is that accurate, Your Honor? A. That is correct.

Q. When you got to the Garrick Theatre, did you notice any signs at the Garrick Theatre indicating an age at which a person had to be admitted? A. I didn't check the signs outside, and I don't recall that the picture opened with any writing. There was no M or whatever symbol is now used. There may have been at some point, I didn't see it. I say at some point it may have been at the very end, and I am not sure that I waited until the lights went up; [15] I saw the end of the film but whether any credits came or at any rate the warning, if there was one on the film, was not -- would not have been until the end, however, that had no part or bearing on my determination.

Q. Your Honor, was there any warning at the ticket booth as to the age that people had to be when they entered the theatre? A. I certainly don't recall that. I didn't look. I was interested in, to see what the movie would be, to see whether in my opinion, it came within the statute, within the prohibition of the statute.

Q. And, Your Honor, did you pay $3 to enter the theatre? A. Inspector Smyth bought two tickets, and I did not pay. I saw this gratis.

Q. If I were to tell Your Honor, right at the situs where there is a ticket booth--

> The Presiding Judge: It would be completely inadmissible.
> The District Attorney: It would be objectionable.

Q. Now, Your Honor, while you were at the theatre [16] and observed this picture, did you have any discussions with Inspector Smyth with regard to the picture? A. No.

The Presiding Judge: At what point was that, I am sorry?

The Defendant's Counsel: While observing the picture.

The Presiding Judge: Oh, did you discuss it with him?

The Witness: None, except I think I did ask him how much longer the film had to run, at one point, that was the point of our discussion.

Q. Was the film boring to Your Honor? A. Well, I don't know whether that weighed very heavily with me. The answer is for the most part, yes.

Q. Now, Your Honor, have you ever had occasion to see movies on 42nd Street? A. No. I have walked past them.

Q. Your Honor, how many motion pictures would you say you saw during the calendar year, January, 1969 through to the date that you saw this motion picture on [17] July 31?

The District Attorney: Your Honor, I would object to that.

The Presiding Judge: Sustained.

Q. Have you had special training, Your Honor, in motion picture techniques?

The District Attorney: Objection.

The Presiding Judge: Sustained.

Q. Your Honor, are you conversant with the United States Supreme Court decision in Roth versus the United States 354 U.S. 476? A. What was the item involved in the case?

The Presiding Judge: That is the case where a magazine operator by the name of Roth operated in Times Square, sent obscene material through the mail and convicted under the Federal obscenity statute. It is at the same time and the same occasion--

The Witness: Oh, I thought you said the Volt Case. The Roth case.

Q. R-O-T-H, yes. A. Yes.

Q. Are you conversant with the case of Redrup versus [18] New York which was decided by the United States Supreme Court in the latter portion of 1967?

The District Attorney: Your Honor, I object to this.

The Presiding Judge: What is the relevancy? Sustained.

Q. Your Honor, will you give us the definition of obscenity as you understand it?

The District Attorney: Objection.

The Presiding Judge: Sustained.

Q. There must be a criteria, Your Honor, by which you determined this film to be obscene. Will you tell us what criteria that was? A. I already did. I stated that right in the beginning of my--

Judge Moldow: Justice Goldberg--

The Presiding Judge: The objection is sustained.

The Witness: Pardon me.

Q. Did you find the camera work in this picture to be offensive to you?

The District Attorney: Objection, Your Honor.

[19]The Presiding Judge: Sustained.

Q. Did you call anyone at the theatre prior to signing your ex-parte order? A. No.

The Defendant's Counsel: I have no further questions.

The Presiding Judge: Thank you. Thank you, Your Honor.

(Witness excused)

The District Attorney: The People now call Inspector Smyth to the stand.

Judge Moldow: Before Judge Goldberg is excused, I have this thought in mind, that is my understanding that we are going to view the film, that there is going to be a stipulation that the film we are going to see is the same one Judge Goldberg saw?

The Defendant's Counsel: Most assuredly.

Judge Moldow: Or do we require his presence here?

The Defendant's Counsel: Most assuredly I will stipulate.

[20] The District Attorney: Yes.

The Presiding Judge: All right.

Judge Moldow: Thank you.

(Witness again excused)

Court Officer Joseph Hughes: Raise your right hand and face the Judge. (Witness complies)

Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Please be seated.

Court Officer Joseph Hughes: Name, shield and assignment in a loud voice.

The Witness: Deputy Inspector Charles Smyth, First Division, New York City Police Department.

DEPUTY INSPECTOR CHARLES SMYTH, called as a witness on behalf of the People, assigned to the First Division, New York City Police Department, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the District Attorney:

[21] Q. Inspector Smyth, during the month of July, 1969, did you have occasion to see a movie entitled A Blue Movie? A. I did.

Q. How many times did you see that movie? A. Twice.

Q. When was the first time you saw that movie? A. July 29th.

Q. Where did you see that movie at? A. In the Garrick Theatre, 152 Bleeker Street, New York City, which is in the Greenwich Village section.

Q. And, at that time, when you saw it on July 29th, what time did you see it? A. Approximately 3:40 to 5:20 p.m.

Q. And, did you see the movie by yourself that date? A. I did. No, I am sorry, I did not. Accompanying me were Inspector Rockwell of the Manhattan South, and Lieutenant Sullivan, also of Manhattan South.

Q. Did you have later occasion to see that movie, also? A. I did.

Q. When was that? [22] A. July 31st, approximately the same showing, 3:40 p.m. to 5:20 p.m.

Q. Did you see that movie by yourself or with somebody else? A. I saw that movie with Judge Goldberg.

Q. Officer, on each occasion that you saw this movie, about how many people were in the theatre? A. Approximately 100 on each occasion.

Q. And, if you recall, could you approximate roughly the seating capacity of the theatre? A. I would say about 200.

Q. Now, officer, on July--you testified that you saw the movie at a second time on what date? A. July 31st.

Q. Now, on July 31st, did you also make arrests that day? A. I did.

Q. Would you please relate to the court, the facts and circumstances leading to the arrests that you made on that day? A. At the conclusion of the performance--

Q. (interjecting) Officer, perhaps you should [23] start a little bit earlier at the beginning of the movie when you were accompanied-- A. (interjecting) I accompanied Judge Goldberg to the movie, at my request, well, at the request of the District Attorney, with myself, he and I viewed the showing of the Blue Movie from 3:40 to approximately 5:20 p.m. At the conclusion of the performance, Judge Goldberg and myself walked outside, I asked the Judge if he felt it was obscene.

The Defendant's Counsel: Objected to, Your Honor.
The Presiding Judge: Sustained.

A. (continued) I felt--

Q. What did the Judge do?

The Presiding Judge: Don't tell us your conversation.

A. The Judge then signed a search warrant.

The Presiding Judge: A search warrant?

The Witness: Yes, sir, it is also a search warrant giving us the right to search for the film and three arrest warrants, at the conclusion of which I took these warrants, went back into the theatre, [24] and placed under arrest the three persons, and acquired the film which was in the projection room.

Q. Now, pursuant to that search warrant, what material did you take from that theatre? A. Three reels of film.

Q. Is that the only property you took? A. That is the only property I took.

Q. Now-- A. (interjecting) There was, yes, excuse me, there was one poster which the manager said we might have, also, depicting--

The Defendant's Counsel: That is objected to.

The Presiding Judge: Sustained to what it depicts. Do you have the poster?

The Witness: I had in in my office. It is not in evidence, it was just the fact that Mr.--

The Presiding Judge: We will decide, Inspector, with due deference to your high rank what is evidence.

The Witness: All right.

[25] Q. All right, Inspector, pursuant to those arrest warrants, are any of the parties named or arrested that date here before us today? A. Yes, Mr. Heller is here.

Q. And what was Mr. Heller's capacity as indicated in the arrest warrant?

The Defendant's Counsel: It speaks for itself, Your Honor.

The Presiding Judge: Yes, it speaks for itself. Regardless of what the arrest warrant says, do you know what his connection with the film is or was?

The Witness: He was manager of the theatre.

Q. All right, Officer, could you please elaborate or relate the circumstances under which you took this film, where was the film located when you took this film? A. In the projection room. One of the reels was still in the projector, and two were laying next to it.

The Presiding Judge: Did you sign a complaint, sworn complaint in this case?

[26]The Witness: I did.

The Presiding Judge: When were the warrants issued, before or after you executed the complaint?

The Witness: The forms had been prepared--

The Presiding Judge: No, when were the warrants signed?

The Witness: After the completion of the film.

The Presiding Judge: Was it after you made out the complaint, signed the complaint and swore to it or before?

The Witness: The complaint--the warrants were prepared at the time I made the complaint.

The Presiding Judge: I didn't ask you whether they were prepared, Inspector.

Judge Moldow: We assume they were prepared before.

The Witness: Yes.

Judge Moldow: When were they executed, is the Judge's question.

The Witness: They were executed after the [27] film had been viewed.

The Presiding Judge: You also signed a sworn complaint?

The Witness: Yes.

The Presiding Judge: With relationship to the time when you signed that sworn complaint, when were the warrants executed?

The Witness: I don't follow.

Judge Moldow: Do you remember swearing to the complaint?

The Witness: Yes.

Judge Moldow: When did you do that?

The Witness: I swore to it on July 30.

Judge Moldow: That the day before?

The Witness: Yes, right.

The Presiding Judge: No, look at the paper, will you please, Inspector. Is that your complaint, Inspector?

The Witness: Yes.

The Presiding Judge: Did you swear to it and sign it?

The Witness: I did.

[28] The Presiding Judge: When, what date? Look at the original. Is there a date on there, that the date you swore to it?

The Witness: I am trying to find it. It was--no, the blue sheet isn't here, is it?

The Presiding Judge: Do you have any trouble finding the complaint?

The Witness: Yes, July--wait a minute, July 31st.

The Presiding Judge: Was that the date you saw the film with Judge Goldberg?

The Witness: That is.

The Presiding Judge: All right. Now, the warrants, wait, are you confused?

The Witness: I am confused on this. Just a minute, please, he said the blue sheet but--

Court Officer Joseph Hughes: That is the complaint.

Judge Tolleris: That the complaint?

The Witness: This is the complaint after the arrest was made. This is the complaint after the arrest was made, this is not the one for the warrant.

[29] The Presiding Judge: Inspector, will you kindly look at the complaint that bears your signature.

Judge Moldow: Don't concern yourself with the warrant.

The Witness: I am sorry, this is what I understood the judge to say.

The Presiding Judge: Will you kindly look at the complaint?

The Witness: The complaint was signed July 31.

The Presiding Judge: By you?

The Witness: By me.

The Presiding Judge: Do you remember Judge Goldberg signing warrants?

The Witness: I do.

The Presiding Judge: Arrest and search?

The Witness: I do.

The Presiding Judge: Were those warrants signed by Judge Goldberg before or after you signed that complaint?

The Witness: It was signed before I signed [30] this complaint.

The Presiding Judge: You mean Judge Goldberg signed warrants before you made a complaint in the case?

The Witness: This is the arrest complaint.

The Presiding Judge: I am not asking--forget it.

The Witness: You got me confused on--

The Presiding Judge: I don't see how you can--withdrawn. You made the complaint?

The Witness: I did.

The Presiding Judge: Judge Goldberg signed a search and arrest warrant based on your complaint, was it?

The Witness: Based on my application for a search warrant and arrest warrant.

The Presiding Judge: Well, that was--

The Witness: (interjecting) It is not in here, it is not in here.

Judge Tolleris: Did you sign a separate affidavit applying for an arrest and search warrant?

The Witness: Yes.

[31] Judge Tolleris: Prior to the time you signed that?

The Witness: Yes, this is a copy of it.

Judge Tolleris: In other words, you made your application based on ordinary affidavit, what you considered probable cause?

The Witness: Yes, that is right, of the application for the search warrant.

The Presiding Judge: Show it to the District Attorney.

The Witness: This is the confusing part.

The Presiding Judge: Is it your testimony, that based on your application for a search warrant, and before the judge looked at the picture, he signed the search warrant, is that your--

The Witness: (interjecting) No, it is not.

The Presiding Judge: That is what I am trying to find out.

The Witness: I made application for the search warrant.

The Presiding Judge: I don't care what you made an application for or when you made it. [32] I am trying to find out when the Judge signed the search warrant.

The Witness: After viewing the film.

The Presiding Judge: And was that after you made--since your written complaint here?

The Witness: If you mean the blue complaint after the arrest, it was before, this blue complaint was drawn up that evening after the arrests had been consummated. This is the blue form which was drawn up after the arrests had been consummated.

Judge Moldow: Will you tell me and see if I understand it, you and Judge Goldberg saw the film?

The Witness: Yes.

Judge Moldow: And after you saw the film, you presented him with an application for search and arrest warrants based on a supporting affidavit?

The Witness: Correct.

The Presiding Judge: He signed the search and arrest warrants and you executed those warrants by arresting some people and seizing some film?

The Witness: Correct.

Judge Moldow: Thereafter, during the course [33] of the same day, you signed a full complaint and affidavit in this case?

The Witness: I did, that's right, that is what I am trying to explain, and that blue sheet was signed after the arrest was consummated.

The Presiding Judge: And warrants were signed by Judge Goldberg after he had seen the picture?

The Witness: Correct.

The Presiding Judge: All right. Thank you.

Q. All right, Officer, when you walked into the projection room, how many reels were in the projector? A. One reel was in the projector.

Q. And how many reels were in the projector room? A. Three.

Q. Were there any other films there? A. No other films that I viewed. I looked in the area, and there were no other films.

Q. When you took these three reels, what did you then do with the three reels? A. I spoke with the projectionist.

Q. Just tell the court what you did with the three [34] reels. A. I took the three reels and had them sent to the property clerk's office.

The Presiding Judge: You had them sent or you brought them there?

The Witness: I had them vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office.

Q. And at what point did you pick these up from the property clerk's office? A. As I recall, it was August 26th.

Q. And, have you had them in your possession since August 26th? A. I did.

Q. Where did you have them in your possession? A. I had them in my locker with my private lock on it, only I know the combination of it.

Q. Do you have those films here with you today? A. I do.

Q. All three reels? A. All three reels. Do you want to open that?

[35] The District Attorney: Yes. The officer is now opening a plastic container. Any question about these being--

The Defendant's Counsel: No question. We stipulate.

The Presiding Judge: All right, stipulated and offered as People's 1 of a movie entitled Blue something, Blue Movie.

The District Attorney: Property clerk voucher 69M24592. People's 1 in evidence deemed marked People's 1 in evidence.

(Whereupon plastic container with three reels of movie film was deemed marked People's exhibit 1 in evidence.)

The District Attorney: The People have no other questions of the Inspector at this time, and we are prepared to present the movie to the Court.

The Presiding Judge: All right.

Cross-Examination by the Defendant's Counsel:

Q. Deputy Commissioner (sic) Smyth--

[36] Judge Moldow: Deputy Inspector. Now you promoted him.

The Defendant's Counsel: I am sorry.

Q. (continuing) Deputy Inspector Smyth, when you first saw the movie on July 29th, who went to the theatre with you on that date? A. I just stated Inspector Rockwell and Lieutenant Sullivan.

Q. When you went to the movie that day, did you pay an admission fee? A. I certainly did.

Q. Did you notice signs in the lobby when you walked into the theatre with regard to age? A. I don't recall seeing any such sign.

Q. Now, on July 31st, you came back to the theatre again? A. I did.

Q. And you paid another admission fee? A. Right.

Q. And did you see any other sign there with regard to age on that day? A. I do not recall seeing any such sign.

[37] Q. Now, on July 31st, at 5:30 in the evening, Judge Goldberg, or thereabouts, signed a search warrant and arrest warrant, correct? A. Correct.

Q. Now, you had papers which you submitted to Judge Goldberg for signature prior to his signing of those documents, is that accurate? A. It was the application for such--

Q. (interjecting) Where did you sign that paper? A. In his--at his presence.

Q. At 5:30 that evening, correct? A. Right.

Q. Okay, and the formal complaint in this matter was drawn subsequent to seven o'clock that evening, is that correct? A. Subsequent to the arrest.

Q. Right, and at about six o'clock that evening, did you see me at the Garrick Theatre? A. You came there, that's correct.

Q. Did I point out to you that the seating capacity, there was a big sign there, had 299 seats, if you recollect? [38] A. I don't recall you pointing out any such sign. Originally you stated you were the manager.

The Presiding Judge: You said what?

The Witness: I do not recall.

The Presiding Judge: Originally you said what?

The Witness: Originally I asked for the manager and he said that is me, and when I said I had the John Doe warrant, he said he was only the lawyer, Mr. Heller was the manager.

Q. Did you see any sign there on that day which indicated right above the ticket taker's booth, indicating that you had to be over the age of 17 to get into the theatre?

The District Attorney: Objection. The question was asked and answered.

The Presiding Judge: Overruled. He is not bound by it.

A. I do not recall seeing any such sign.

Q. Now, did Mr. Heller arrive there that night? A. He did.

Q. Was he the one who had a key to let you into a [39] room there that night, do you recollect that? A. He did.

Q. This was the manager's room? A. Correct.

Q. Did you look through the room that night? A. With his permission, we did.

Q. Okay. Now, are you aware of the type of motion picture films shown in and around the City of New York?

The District Attorney: Objection.
The Presiding Judge: Well, he can say yes or no.

A. I am aware of certain types.

The Presiding Judge: The answer is yes or no, Inspector.

A. (continuing) Yes.

Q. Are you aware of the dramatic change in social climate with regard to the depiction of sex on the screen?

The District Attorney: Objection.
The Presiding Judge: Sustained.
The Defendant's Counsel: Your Honor, I think at this point I have to state the following. [40] I have been curtailed in my cross-examination and I think one of the es-

sential elements in proving obscenity as defined in Your Honor's own case, that it must be patently offensive because it affronts contemporary community standards as enunciated in the three cases that the Supreme Court has set down. It is impossible for me--

Judge Moldow: Aren't you the last one to want this man, this witness, to set those standards?

The Defendant's Counsel: I may want him to set the standards because I don't think he knows them.

Judge Moldow: We are not going to let him set the standards. I think I speak for my brother judges.

The Presiding Judge: Yes. I might point out to you, Counselor, that there is a wide diversity of opinion throughout the country, including the federal courts, on this very issue. Now, there are some cases that have held that it is part of the People's case to establish what the so-called [41] community standards are. There are other cases which hold that that is not a part of the People's case. There are some cases that hold that expert testimony as to what community standards are, should be introduced. There are other cases that hold to the contrary.

The Defendant's Counsel: Agreed, Your Honor.

The Presiding Judge: And even Redrup, which you cite as a leading case, the judges split four different ways, they couldn't agree on an opinion, all they could agree was that the case should be reversed. All right.

Q. Have you had any special training in the theatre, as to theatre background?

The Presiding Judge: You mean as active producer, manager?

Q. (continuing) As a theatre critic? A. No.

Q. Do you have any journalistic background with regard to theatre? A. No.

[42] Q. Now, did you have any talks with Judge Goldberg while you were at the theatre that day with regard to the signing of the search warrant, and prior to his signing the search warrants? A. Will you clarify that a little bit more?

Judge Moldow: I would appreciate that, too.

Q. During the course of the movie, did you speak to Judge Goldberg? A. Yes.

Q. What did you ask him about? A. He asked me if it was much longer.

Q. Did you find the movie boring? A. Absolutely.

Q. Did you find it repetitious? A. Well, yes, I would say--what do you mean by repetitious, the acts or the conversation?

Q. The conversation. A. I found the entire thing boring, repetitious, if you wish.

Q. Have you seen any Andy Warhol films before?

The District Attorney: Objection.
The Presiding Judge: We will allow him to say yes or no.

[43] A. No, not to my recollection. I might have seen them and not known it.

Q. Did this movie arouse you to go out and find a woman and go to bed with her?

The District Attorney: Objection.
The Presiding Judge: Sustained.
The Defendant's Counsel: No further questions, Your Honor.
The Presiding Judge: All right, thank you, Inspector.
(Witness excused.)
The Presiding Judge: Anything else?
The District Attorney: At this time the curtain will rise on the movie.
The Presiding Judge: All right, we will look at it. Counsel, please. (Discussion off the record.)
(Whereupon recess was taken while attorney in another matter made an application).
(Whereupon interested parties retired to chambers where film was viewed and following remarks were made during filming.)

[44]The Presiding Judge: Shall we get a couple of yellow pads for the Bench, please? All right, go ahead, run it. (Film runs). Do you have sound on it? We have no sound as you all observed. (Film runs again). For the record, what are these people saying, none of the judges can hear? Is there anything wrong with the machine or is that the way it is going to be projected? Is that the way it is going to go? (Film runs). Because we find it extremely difficult to understand most of the words being said.

The District Attorney: There will be testimony, Your Honor.

The Presiding Judge: All right, go ahead. Sorry. (Film runs) The sound is much clearer now. (Film runs). At this point the sound is dead. (Film runs). Although we can observe the actors are talking to each other. (Film runs.) All right, we will take a recess.

(Recess taken while second reel was being readied.)

[45] (Second reel of film was shown and a recess was taken to be resumed after luncheon.)

(Court convened again in Chambers after luncheon recess.)

The Presiding Judge: All right, the District Attorney and Counsel are present. Let's go. We will now have the third reel.

Judge Tolleris: Lights.

Judge Moldow: Would you adjust the focus on that, please? That is better.

(Film runs.)

Judge Moldow: It is still out of focus.

(Film runs to end of reel.)

(Court reconvened in courtroom.)

The Presiding Judge: After the picture was shown, we are still on the People's case.

Mr. Beckler, we have viewed the film, and the case is still with you, Mr. D.A.

The District Attorney: Yes, Your Honor. The People will now rest their case.

The Presiding Judge: All right.

The Defendant's Counsel: Your Honor, at [46] this time I would like to make some motions with regard to the case.

The Presiding Judge: Proceed.

The Defendant's Counsel: At this time, Your Honor, the defendant moves to dismiss on the ground that the People have failed to make out a prima facie case, and the motion is a hydra-headed one, premised upon the Roth, the Redrup case, and the later case involving Stanley versus Georgia, all of which cases--

The Presiding Judge: Stanley versus--

The Defendant's Counsel: Stanley versus Georgia.

The Presiding Judge: Oh.

The Defendant's Counsel: As I understand the law in the State of New York--

The Presiding Judge: That is the one that Judge Marshal wrote the opinion on?

The Defendant's Counsel: That is correct, Your Honor.

The Presiding Judge: On viewing pictures--

The Defendant's Counsel: In the home.

[47] The Presiding Judge: (continuing) In the home.

The Defendant's Counsel: Yes, as I understand the law, Your Honor, and after having read Your Honor's opinion in People versus Stabile, the law in the State of New York is the same as the Federal law, to wit, that it is incumbent in order to define obscenity within the purview of either the Federal law or the State law that all three elements enunciated in the law and Redrup must coalesce, firstly, that the dominant theme of the material taken as a whole must appear to prurient interests in sex, that the film must be patently offensive because it affronts in this particular case contemporary community standards in its description and representations of sexual matter, and that it is utterly without redeeming social value.

The sole testimony that is adduced before this court here today, hasn't had one iota of testimony from any witness as to any one of those elements.

Therefore, on that basis alone, the filming [48] of the picture, per se, is insufficient, as a matter of law, predicated upon the determination of the United States Supreme Court to hold obscenity without some connection. We have no connection from any of the witnesses to show that. That is the first argument.

The second argument, there has been no prior adversary determination. Now, although the courts in this country have not had a United States Supreme Court ruling on whether or not a prior adversary determination must be had, in an obscenity case, there is a case in Virginia which was just recently granted certiorari to the United States Supreme Court on that very issue. In addition--

The Presiding Judge: What case is that?

The Defendant's Counsel: It is a Virginia case.

The Presiding Judge: The Lee Art Theatre, Virginia.

The Defendant's Counsel: Just was granted certiorari to the United States Supreme Court.

[49]The Presiding Judge: Isn't that a United States Supreme Court case?

The Defendant's Counsel: No, that was--

The Presiding Judge: I think so.

The Defendant's Counsel: Well, I will get hold of that case.

The Presiding Judge: Well, I will get hold of that case.

The Presiding Judge: Well, I have the notes downstairs in my chambers, and I am reasonably certain that this was a United States Supreme Court citation.

The Defendant's Counsel: Not on that issue, Your Honor.

The Presiding Judge: Well, I don't know what the issue is but wasn't Lee Art Theatre the case where a search warrant was granted to a local sheriff by a police justice?

The Defendant's Counsel: Right.

The Presiding Judge: (continuing) In which the supporting affidavit stated the sheriff's observation of the film, and that he concluded that it was obscene without the justice of the peace himself or any other judicial officier viewing the [50] film, issued the warrant, and the United States Supreme Court in that case, said that the warrant was not based on any judicial determination of obscenity, that there was nothing in the supporting affidavit to show the basis on which the conclusion of obscenity was reached by the police officer, and on which the justice of the peace could act, and therefore they say that it violated the safeguards of the first and 14th amendments, and they strongly hinted, at least as I read the case, that the proper procedure at the minimum would have been for some judicial, prior judicial scrutiny. That is the Lee Art Theatre versus Virginia and it was a United States Supreme Court decision last year.

The Defendant's Counsel: Now, may I say--

The Presiding Judge: Maybe you have another case but that is the Lee Art case that I just recited to you.

The Defendant's Counsel: Well, on a diminution basis then, assuming arguendo that in fact the Supreme Court said that you have to have a judicial determination or judicial scrutiny--

[51]The Presiding Judge: But they didn't say that.

The Defendant's Counsel: In this case we don't have any supporting affidavits in this courtroom as of now, the predicates of which the search warrant and the arrest warrants were based. The testimony elicited from Deputy Inspector or Commissioner Smyth was to the effect that he signed a complaint subsequent to the search warrant.

There is nothing in the evidence here today that I have seen, which would indicate some basis for Judge Goldberg going to the theatre other than a verbal communication, and making an ad hoc determination much the same as any law enforcement agency, and in effect Judge Goldberg is in the same position as a police officer making a censorship situation, he went in and so stays. They do have statutes which permitted a judge to go in and view a film, where a police officer has come in, written up a whole report on the film, and set forth what he found to be unconventional sex, conventional sex where it was obscene, etc. We don't even have that [52] in this case, but I maintain, even if you did have that, that still would be violative of the Constitution because you must have a prior adversary determination to buttress that argument.

I hand to the Court a decision of Judge Zirpoli which came down from the Ninth Circuit, California, Nineteenth District on August 29th, which says, however horrid, the same as in the I Am Curious case, whatever the picture may say, the rights of the defendant are paramount.

The Presiding Judge: How about the decision of Judge McLean in 208 Cinema versus Vargari, the Southern District of New York, and Judge--

The Defendant's Counsel: In Judge McLean's decision in the 208 case, he set forth that he was not following two determinations of two other United States District Court judges on the same level as he, but in that case, if you read the supporting papers, a policeman on long affidavits had a judge view the films, and he said in his opinion, based upon these papers, the judge had a right to view the films, look at the films, [53] and make this determination, also he was not going to be bound by his colleagues on the same line.

I happen to be quite familiar with that case, Your Honor, and I do know that the difference between that one and this one, at best, we have nothing before this Court except a determination by an individual, which is the Judge here, signing the complaint without any supporting papers.

I say that is clearly violative of any rule that any court has ever set down in the United States.

Judge Moldow: In other words, you say that while the determination made by a judge, but you would qualify it as a non-judicial determination?

The Defendant's Counsel: I would--

Judge Moldow: Because of an absence of an adversary proceeding?

The Defendant's Counsel: That is correct, and I would say it is confiscatory in nature, also, because what the judge has done in this case, and it could be anyone, not Judge-- whoever made this [54] determination just happens to be Judge Goldberg.

The Presiding Judge: No, that isn't quite a fair statement.

The Defendant's Counsel: Right.

The Presiding Judge: The determination was made by a judicial officer.

The Defendant's Counsel: That is accurate.

The Presiding Judge: That is something different than saying it happened to be a person who accidently happened to be a judge.

The Defendant's Counsel: Right. Well, I beg--

The Presiding Judge: We are making the distinction, I believe, and under the cases that a judicial officer is more competent say the various federal decisions to make a decision of obscenity than the ordinary layman, and that the question of obscenity or whether a publication is protected by the First Amendment, is a question of law for a judge or a court to decide. That is what I Am Curious Yellow is, so all right, go ahead.

The Defendant's Counsel: Now, in Judge Goldberg making this decision, and I don't throw [55] this in as a twist, but it came out as a result of the testimony, in effect what he has done, and this may be slightly tangential, is to look at a picture, and the picture is the best evidence, allegedly, self-incrimination on the picture, decide on his own without having anyone else present to defend the picture.

Now, I would only bring that up, Your Honor, based upon the fact that in this particular case, they could have written out a protracted set of facts containing what was wrong with this picture, if anything. Deputy Inspector Smyth had two full days, which he testified to here, between the 29th and 31st, to sit down and write out a formal complaint, take the complaint, or take the affidavit to a judge, show him that affidavit, and not done what was shooting at the hip in this particular case; at 5:25 in the afternoon, he submitted an affidavit, and at 5:25 on that very afternoon, a search warrant was signed, and arrest warrant is signed, the picture is seized, nobody is brought down to even defend the position of the picture, [56] and that is the end of it.

In my opinion, Your Honor, and I only say this, there has not been a scintilla of evidence adduced by the People, which would warrant this case going to the defendants coming forward with evidence.

The Presiding Judge: Yes, Mr. Beckley?

The District Attorney: Yes. I will just speak briefly.

Your Honor, first of all, on the defense's first element that this, that the People have not presented any evidence as to the three tests of obscenity, I think the cases will hold that the actual presentation of the material itself, in this case the movie, The Blue Movie, being viewed by the judges of the court, is enough for the People's case.

It is unnecessary for the People to present representatives of the community to define community standards, nor is it necessary for the People to present expert witnesses testifying as to whether or not this movie is or is not appealing to the [57] Prurient interests, or whether or not it is patently offensive to the social community standards.

I believe that our burden here in presenting the case is sustained merely by the showing of this film to the Court.

On defense counsel's second point, I think that although there is a dramatic presentation here of a police office witnessing the movie, then waiting two days before he presents an affidavit to a judge, I think the fact was brought out quite clearly that this affidavit was presented to the judge, who read it and the judge then signed the search warrants and arrest warrants, based on the affidavit produced by Deputy Inspector Smyth.

Furthermore, I think the Rage book case makes it quite clear that this court, a higher court than this court in this district, namely the Southern District Federal Court has held that there is no necessity for a prior adversary determination of obscenity, when the District Attorney offers, or the police move to emphasize the State's obscenity laws.

[58]The Presiding Judge: Well, of course there are cases, and the Kingsley Books versus Brown, the United States Supreme Court said we are not going to in effect tell the State what remedy in the armory of the law they are to choose to persecute the defendant. They may do it by an adversary proceeding or by criminal prosecution.

I don't think that has been disturbed as yet. Now, I want to ask one other question of Counsel.

When you talk about an adversary proceeding, are you referring to the proceeding under 22a of the Code?

The Defendant's Counsel: No.

The Presiding Judge: Well, how else would you have it?

The Defendant's Counsel: I am talking about a proceeding where it might be -- the adversary proceeding done under 22a of the Code, it could be in an informal conference, it could be under any set of circumstances but there must be--

The Presiding Judge: Well, you are only [59] having judicial hearings or you can label them conferences in accordance with the terms of the existing statutes.

The Defendant's Counsel: Well, let me say this, Your Honor, built into the federal statute which we do not have in the statute, is the following. There is a proceeding where a man brings in a film from export, from overseas, the Customs Department seizes the film. They must give notice to the defendant, the defendant then has a right within five days to institute a proceeding, and you have built--

The Presiding Judge: Yes, a judicial proceeding tó determine it.

The Defendant's Counsel: Right.

The Presiding Judge: Now, the only proceeding that I am acquainted with is Section 22a of the Code of Criminal Procedure. Do you know of any other proceedings under which it could be held?

The Defendant's Counsel: No, I don't.

Judge Moldow: And the federal statute is [60] predicated on the fact that there is an immediate seizure without any kind of judicial review.

The Defendant's Counsel: Not entirely accurate, Your Honor.

The Presiding Judge: Well, if I may?

The Defendant's Counsel: Sure.

The Presiding Judge: I do not want to get into semantics here, but the seizure by customs is not technically a seizure under the law, it is merely a detention by customs, and the film is not seized until after a judicial determination as to its obscenity.

Judge Moldow: In the meantime, nobody is seeing the picture.

The Presiding Judge: No one has seen it, but let me go a step further.

If you read 22a of the Code, 22a refers

to tangible objects, immutable objects, or practically immutable like books, magazines, the printed word.

The Defendant's Counsel: Right.

The Presiding Judge: Devices, objects.

[61] The Defendant's Counsel: Yes.

The Presiding Judge: Nowhere in 22a will you see any reference to theatrical productions or motion pictures. Now, that is not an accident.

As a matter of fact, in 1966, there was introduced into the state legislature two bills to amend 22a, to include motion pictures, and both bills died in committee. Now, this to me, means that the legislature advisedly or ill-advisedly, but nevertheless deliberately left out motion pictures under that code, under that code provision, and the reason is good, it is simple, may not be good but it is completely understandable, and if you read the 208 Cinema against Vergari up in the Southern District, you can understand the reasoning behind it. How do you seize a motion picture? Now you have got a picture showing in your theatre, how do the police seize it?

The Defendant's Counsel: How do they seize it in 208, Your Honor?

The Presiding Judge: By a warrant.

The Defendant's Counsel: Based upon what? Based upon a protracted affidavit setting—

[62]The Presiding Judge: No, whatever it was, there was an affidavit of support, in

support of a warrant, and a viewing by the judge, and then the search warrant was issued. Now, this is essentially what was done here. Now you want a protracted affidavit?

The Defendant's Counsel: I don't see the affidavit here.

The Presiding Judge: Wait a minute, you never attacked the warrant unless now—

The Defendant's Counsel: I don't believe I have to attack the warrant.

The Presiding Judge: Well, that is a moot question now, I won't debate that with you now but there is no way of knowing that the motion picture film that is seized has not been tampered with by the time it gets to the Court for a judicial determination of obscenity, and I call your attention to an article a few Sundays ago in the Sunday Times by Victor Canby, quote, the title is, Which Version Did You See?, referring to the motion picture The Wild Bunch, in which the eight minutes of the original [63] film were lifted right out of the film that was displayed.

Now, it is easy to edit, to cut, to take stuff out of motion pictures so that there is no assurance that the film, to follow your idea of how this should be handled, there is no assurance that the film that the police or the public saw originally is the same film or would be the same film that the judge would see in an adversary proceeding, and I ask how do you seize a film other than by a search warrant?

Now, the purpose of all of this legislation has been to protect the First Amendment, a right to freedom of speech, and that is being done by this Court and this case, at least I am not prejudging what we are going to do with this thing, I haven't discussed it with my colleagues as yet, but it seems to me as Judge McLean in the Vergari case, 208--

The Defendant's Counsel: 208 Cinema.

The Presiding Judge: (continuing) 208 Cinema versus Vergari, that what more can you do than to have the officer make an affidavit, and the [64] police, the judge go in and look at the picture, what more can be done, and search; there is no provision in my view, I don't know if my colleagues will agree with me, we haven't discussed it yet, but in my view there is absolutely no provision for the seizure to an adversary proceeding under 22a in the Code of Criminal Procedure, either as to motion pictures or as to theatrical productions.

The Defendant's Counsel: Well, Your Honor, I can only say this, I am conversant with the 208 Cinema case, I am not in accord with Judge McLean's determination in the case.

It is logical, most of the United States district courts throughout the country have held contrary to Judge McLean, or Judge McLean had something before him which is not before this three man bench, and that is the following, he had a substantial affidavit, not the testimony of a police officer who hasn't even exhibited in the courtroom as of now as to what his affidavit was; on that basis Judge McLean might have had the right to rely upon the affidavit, and the judge [65] seeing the picture. We certainly don't have that here today, and my argument, therefore, is, Your Honor, assuming Judge McLean is right and 22a doesn't have the requirements for an adversary determination, the People have failed to prove their case by not doing acts that they had time to do.

The District Attorney: Your Honor, may I speak?

The Presiding Judge: Well, I just want to say one thing. It seems to me, and I am not going to talk for both my colleagues, that if you are talking about the warrant and the seizure, your remedy would be motion to controvert the warrant.

Judge Tolleris: I agree.

Judge Moldow: The Judge saw the picture in question. Isn't he in a much stronger position than relying on any affidavit of somebody else's observation? I think he did everything that he could have done.

The Presiding Judge: All right.

The Defendant's Counsel: One last question. [66] My last point on the argument is this, that the statute is unconstitutional, because not built into the statute itself--

The Presiding Judge: You mean 235.05?

The Defendant's Counsel: Yes, 235.05

of the Penal Law is unconstitutional, because not built into the statute itself, coupled with Your Honor's observation of 22a, there is no effective modus operandi procedurally for a speedy trial, despite the provision of the Code of Criminal Procedure which says you must get a speedy trial under some other section. It must be built into the section itself, Freedman against Maryland.

The Presiding Judge: Yes, that is a well known case.

The Defendant's Counsel: Right.

The Presiding Judge: All right, we will consider the motion to dismiss at the end of the People's case.

(Court confers.)

The Presiding Judge: Motion is denied.

The District Attorney: At this time, the [67] People would move to dismiss any other defense witnesses.

The Presiding Judge: All right.

The Defendant's Counsel: I have only four witnesses.

The Presiding Judge: Are they expert witnesses?

The Defendant's Counsel: Three of them. Do you want them excluded?

The District Attorney: Yes, I do.

The Presiding Judge: All right, all witnesses except the one called to the stand to testify outside. All right, call your first witness, please.

Court Officer Joseph Hughes: Take the stand.

Judge Moldow: Raise your right hand. (Witness complies.)

Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

[68]The District Attorney: Your Honor, have the witnesses been excluded?

The Presiding Judge: I have directed that all witnesses on both sides, except the witness on the stand, will kindly step outside until called. That goes for the police and everybody else. All of the other witnesses as well.

Court Officer Joseph Hughes: Give your name, address and occupation, keep your voice up so the judges can hear you.

The Witness: Parker Tyler. I live at 15 Charles Street, New York. I am a writer by profession.

PARKER TYLER, witness called on behalf of the defendant, residing at 15 Charles Street, New York, New York, occupation writer, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Now, Mr. Tyler? A. Correct.

Q. Will you tell us what you do for a living? A. I write books, mainly.

Q. And what do you write books about? A. About motion pictures and painting.

Q. And, for how many years have you written books about motion pictures? A. My first book was published in 1944.

Q. What was the name of that book? A. The Hollywood Hallucination.

Q. And, since 1944, will you tell the Court what books you have written with regard to film? A. I have written altogether six. The second was Magic and Myth of the Movies, the third was a Biographic Study of the Chaplin Myth. The fourth was Classics of the Foreign Film, the fifth was a collection of magazine pieces, Three Phases of Film, and one published just this month is called, Sex Psyche, et cetera In The Film.

Judge Moldow: What was the title again?
The Witness: Sex Psyche et cetera In The Film.

Q. Mr. Tyler, have you ever been to a film seminar? A. Oh, yes.

Q. Will you tell us what seminars you have been to?

[70] The Presiding Judge: What is a film seminar?

Q. Will you tell the Judge what a film seminar is? A. I assume he is talking about--

The Presiding Judge: If you don't understand, Mr. Tyler, what he is talking about, we will have him reframe the question.

A. (continuing) I am assuming he is talking about something like the New York Film Festival.

The Presiding Judge: I don't know what he is talking about. He has asked if you have ever been to a film seminar, and for our edification we would like to know, first, what a film seminar is.

The Defendant's Counsel: I will withdraw the question.

The Presiding Judge: If you know what it is.

The Defendant's Counsel: I will withdraw the question and reframe it, Your Honor.

The Presiding Judge: Thank you.

Q. Have you ever attended a film festival?

The Presiding Judge: A film festival?

The Defendant's Counsel: Yes, film festival.

[71]The Presiding Judge: Yes, all right.

A. Yes, I have.

Q. Will you tell us what film festivals you have attended? A. Well, for the last four years, the New York Film Festival where in the special events program, there were lectures and programs in which I participated.

Q. And, did you do any lecturing at any colleges and universities? A. Yes. I lectured at--

Q. (interjecting) Will you tell us what colleges and universities you lectured at with regard to film? A. Columbia University.

Q. When, if you remember? A. That was in the late 40's.

Q. Thereafter? A. At the New School Social Research, at Cooper Union, and various colleges, at Trinity College in Hartford, and not long ago in Albright College, Pennsylvania.

Judge Moldow: Are you paid for these lectures?

The Witness: Yes. Not in every case. Cooper [72] Union is a free school so I am not paid for that.

Q. How many motion pictures do you see during the course of the year? A. Well, I should say about a hundred, at least.

Q. Do you write any articles for any journals? A. Every now and then I do. Lately I have been devoting myself to books. I still write for magazines.

Q. Will you tell us what magazines you have written for? A. Well, in the past I have written for a number of academic magazines, the Kenyon Review which used to be published by Kenyon

College, the American Quarterly published by the University of Pennsylvania, and I have been published by the New Republic, and the Nation.

Q. And all of these articles dealt with films, is that correct? A. Yes.

Q. Now, Mr. Tyler, when was the first time you met me? A. Today.

Q. Mr. Tyler, are you being paid for testifying here today? [73]A. No.

Q. Mr. Tyler, did you see a motion picture, Andy Warhol's Blue Movie? A. Yes.

Q. When did you see that motion picture? A. Oh, I saw it at a private screening about a year ago, I think.

Q. Now, Mr. Tyler, you stated you have a book which came out this month. What is the name of that book? A. Sex Psyche et cetera In the Film.

Q. Now, did you write a chapter in that book, devoting that chapter to this movie? A. Yes.

Q. Mr. Tyler, in seeing Andy Warhol's movie, Blue Movie, did you find any social value in the film?

> Judge Moldow: Before we get into that, Counsel, I will tell you something that disturbs me. We viewed a film, during the course of today, that was very badly edited

in many spots, and I don't think you have to be an expert to see that. This witness has been asked questions about a movie that he saw about a year ago. Aside from the fact that you [74] have identified it by the title, what kind of assurance of any kind do we have that the contents approximated what we saw today? Do you intend to establish that in any manner?

The Defendant's Counsel: I can't. I think it is almost impossible for me to--

The Presiding Judge: That is a problem in these cases that my colleague indicated a little earlier with the affidavit situation. The judge relies on an affidavit, he doesn't know whether that same movie is going to be seized according to the terms of his warrant. Now you are in a similar posture, offering evidence. All we know is he saw something called Blue Movie, and to identify it foot by foot with what we saw today is, I appreciate, an overpowering task, isn't it?

The Defendant's Counsel: I think it is, but I think, Your Honor, if we take the position that we have never refuted the contents of the film that you saw here today, particularly the one act, and this witness is not going to refute that, I don't think there is any unconventional sex in the [75] film, and I don't think there is any problem in dealing with this witness' having seen the film that Your Honor saw this morning.

Judge Moldow: I suppose it will probably go to the weight of his testimony rather than the admissibility, anyhow.

The Presiding Judge: Yes, all right.

The Defendant's Counsel: What was the last question?

The Presiding Judge: Did you devote an entire chapter of your last book, Sex Psyche et cetera In The Film to Blue Movie, this picture, and you saw it a year ago. Go ahead. I think that was it.

Q. Yes, will you answer the question? A. Yes, I did devote a chapter to it.

Q. All right, did you see any social value in the film? A. Yes, I saw a particular social value. I think it represents what might be called the attitude of the cool world toward sex.

The Presiding Judge: The attitude of what world?

[76]The Witness: The cool world.

The Presiding Judge: Cool, C-O-O-L?

The Witness: Yes, that's right.

The Presiding Judge: What is the cool world, if I may--

The Defendant's Counsel: (interjecting) That might be Swoboda hitting a home run last night, I don't know.

The Presiding Judge: You mean Swoboda didn't know he hit a home run?

The Defendant's Counsel: Yes, he did. I would be willing to expand on it.

The Presiding Judge: Well, if there is any objection to the question I will withdraw it, but when he uses a term, I think it would be helpful to the Court if we explained, if the witness explained, or somebody explained what he meant by that term.

Q. All right, what do you mean, Mr. Tyler, by the word cool world, the words? A. I mean an attitude that has grown up in modern times, along sophisticated groups, among youth groups. It is an attitude of detachment, of indifference to the emotions, [77] of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction.

The Presiding Judge: Just like eating the hamburger in the picture?

The Witness: Yes.

Q. Now, have you seen any other Andy Warhol pictures prior to viewing this film? A. Oh, yes.

Q. And, did you notice the same type of camera technique employed in this film as in the other Andy Warhol films? A. Oh, yes. It is always likely unedited footage, strung together, rather informally, and independent in the subject matter but not in camera technique to aesthetic values.

Q. Will you explain what you mean by camera technique and aesthetic values? A. When a film is made to be interesting, all kinds [78] of shots, close-ups and medium shots, and so on, for variety's sake, different angles of the same action, but Warhol's camera is nearly always staring deliberately passive, doesn't try to articulate anything on its own, the actors articulate everything.

Q. Did you find this film sexually stimulating? A. No, not at all.

Q. Did you find this film lewd? A. Not according to my notion.

The Presiding Judge: I didn't get that.
The Witness: Not according to my notion of lewd.

Q. Did you find this film lascivious? A. No.

Q. Did you find this film salacious? A. No.

The Defendant's Counsel: No further questions.
Judge Moldow: Have you seen films of that nature?
The Witness: Yes, not any blue movies, not the films that are manufactured purely for pornographic viewers.
[79] Judge Moldow: What do you mean by the expression blue movies?
The Witness: Well, it is supposed to be a film made, I guess, for stag purposes, merely for the sake of showing the sexual acts so as to excite lewd feelings; these are all sub rosa.

Judge Moldow: So the term blue movie has a special meaning in the motion picture industry?

The Witness: Yes, it is common parlance.

The Defendant's Counsel: But you did not find this to be a blue movie, is that true?

Judge Moldow: Yes, he testified.

The Witness: Yes, it was advertised that way. That was not the original title.

The Presiding Judge: Who advertised it that way?

The Witness: The newspapers at times, and the Village Voice.

The Presiding Judge: What do you mean, they paid for the ads?

The Witness: No, no, I mean the title was represented in the ads as Blue Movie.

[80] The Presiding Judge: And you say the term, Blue Movie, this was synonymous with what we used to call in our youth, stag movies?

The Witness: In common parlance, yes. Yes, I am talking about common parlance, yes.

The Presiding Judge: Yes.

Judge Moldow: Do you know what the title of this picture was before it was renamed Blue Movie?

The Witness: Yes.

Judge Moldow: What was it?

The Witness: Fuck.

The Presiding Judge: What?

The Witness: Fuck.

The Presiding Judge: F-U-C-K-?

The Witness: That's right.

The Presiding Judge: The Anglo-Saxon--

The Witness: (interjecting) That's right.

The Presiding Judge: All right. One more question, Mr. D.A., if you do not mind. What is your age, Mr. Tyler?

The Witness: Sixty-five.

The Presiding Judge: Sixty-five?

[81] The Witness: That's right.

The Presiding Judge: Thank you.

Cross Examination by the District Attorney:

Q. Mr. Tyler, you testified that you started writing books about the theatre in 1944, is that correct? A. Yes, that is the date of my first book. I did a few articles before that.

Q. Your first book was published in 1944? A. Yes, that's right.

Q. Could you please relate to the Court what your formal education was? A. My formal education?

Q. Yes. A. I left Chicago Latin College in my sophomore year in order to write.

Q. This is a high school, Chicago Latin College? A. A college preparatory school.

Q. So your formal schooling ended at the age of 16, approximately? A. Technically speaking, yes.

Q. Did you ever, at any time after that, take [82] any courses in film making or film editing or photography? A. Oh, no, indeed.

The Presiding Judge: Or film criticism?

The Witness: Oh, no, no.

Q. When is the last time you had an article published in a journal? A. I can't remember the last time.

Q. Well, approximately? A. Oh, a year or so ago.

Q. Mr. Tyler, have you ever testified before a trial as to socially redeeming value? A. No.

Q. What does socially redeeming value mean to you? A. I should say the content in a film which made it an authentic psychological and moral document.

Q. I believe when you stated in reference to this movie, The Blue Movie, you said that it represents the cool world's attitude toward sex, is that correct? A. Yes, that is my belief.

Q. And you said it shows two people with gossip and conversation? A. Well, the kind of gossip and conversation that [83] two people might indulge in, in that situation.

Q. Is it your testimony that this cool world attitude towards sex is portrayed through the conversation or through the acts that you witnessed? A. Through the acts, it all meshed as though it were quite an ordinary occasion, not a special occasion when the emotions are raised to a high pitch of sexual feelings.

Q. It might be fair to say that the conversation made no difference in your estimation? A. I regard it merely as irrelevant and incidental.

Q. So the theme of the movie then is essentially what you see, not what you hear, is that correct? A. Yes, I should say that, yes.

Q. How many Andy Warhol movies have you seen specifically, if you recall? A. Oh, I should say about 10, eight or 10.

Q. Was there any story in this movie? A. Any what?

Q. Any story? A. A storyline, I think you mean?

Q. A plot line? A. To this movie?

Q. The Blue Movie, yes. A. No.

Judge Moldow: It is just boy meets girl and that is the way it stays, right?

The Witness: Yes.

Q. Mr. Tyler, you might recall, when you saw the movie, could you hear the sound, did you have any difficulty hearing what was said at times? A. Yes, it was a little low.

Q. You also testified on direct testimony that this movie was not lewd, in your opinion? A. Yes.

Q. Do you think you might venture your opinion as to whether or not it might be lewd to anyone else?

The Defendant's Counsel: That is objectionable.

The Presiding Judge: Yes, sustained.

The District Attorney: Well, Your Honor, I think--

The Presiding Judge: Well, let us get his definition of lewdness, if that is what you are trying to get at.

[85] The District Attorney: Yes, I was getting to that.

Q. You said this movie was not lewd? A. Yes.

Q. What would be lewd to you, what would be a definition of lewdness to you? A. Well, I think the sex films that are shown on 42nd Street, sexploitational, which is highly suggestive and produced essentially to excite the sexual feelings.

Q. Do you call these movies sexploitational? A. Yes, more or less.

The Presiding Judge: Sexploitational?
The Witness: That is more or less a slang word for these films.
Judge Moldow: That is a trade word?
The Witness: Yes.

Q. These are the theatres on 42nd Street and Eighth Avenue in this area? A. Yes.

Q. Those movies that are shown up there? A. Yes.

Q. Have you seen many of those? [86] A. A few.

Q. How many? A. Two or three.

Q. Two or three? A. Yes.

Q. Now, what acts took place in those movies, that would make that lewd and differentiate it from this movie that we saw here? A. Well, it is an act that creates lewdness, the sexual act is perfectly normal, nothing lewd about it.

The Presiding Judge: The sexual act?
The Witness: The way it is treated, yes.

Q. How was the act treated in those movies to make out your definition of lewdness? A. Well, everybody leers, there are all kinds of exhibitions of anatomical parts, it is kind of a flirtation, all seems very naughty and lascivious according to a kind of late 19th century idea of what is, for example, the Fanny Hill movies that I remember best.

The Presiding Judge: Well, those pictures that you have seen, and which you label as sexploitation pictures, to your recollection, sir, [87] do they portray the act of copulation and simulate copulation?

The Witness: Very much simulated.

The Presiding Judge: As simulated as the Blue Movie that we saw?

The Witness: No, not like this. This is—

The Presiding Judge: Not as explicit as this?

The Witness: Yes, literal, not as literal at all.

The Presiding Judge: Because they excite or offer excitement of more than they actually deliver?

The Witness: Yes, that is putting it well, yes.

The Presiding Judge: And the fact that it actually delivers, and quotes around delivers, you say is not lewd, is that correct?

The Witness: That is correct.

The Presiding Judge: The picture that merely titilates--

The Witness: (interjecting) Yes.

The Presiding Judge: (continuing) -- is lewd; but a picture that actually shows copulation [88] is not lewd, is that your definition, sir?

The Witness: That's right.

The Presiding Judge: All right, I just wanted to understand it.

The Witness: Yes.

The Presiding Judge: Thank you. Anything else?

Q. Mr. Tyler, with your knowledge of movies, do you know if there was a script written for this movie?

The Defendant's Counsel: That is objected to. The witness has already testified that there was no script. As to whether there was a script written, I think the witness already testified that he saw no story line.

Judge Moldow: He said he saw no plot.

The Presiding Judge: Well, a script is one thing. You mean a shooting script?

Q. Do you know what a shooting script is?
A. Yes.

The Presiding Judge: All right.

A. (continuing) Well, usually the dialogue is improvised in a Warhol film. Maybe there is a rough script, [89] the actors don't necessarily follow it. They improvise as they go along, but there is nothing like, as far as I know, certain writers have been asked to write scripts, then these scripts are promptly read and tossed aside. The actors memorized what they believed, and went ahead and said what they pleased.

Judge Moldow: Isn't it true that in the Blue Movie, two-thirds of the film is devoted to the couple, the man and woman, in bed? Would you answer aloud, please?

The Witness: Oh, yes.

The Presiding Judge: We have to put it on the record.

The Witness: Oh, I am sorry.

The Presiding Judge: He can't put down a shake of the head.

The Witness: I am sorry.

Judge Moldow: Isn't it also accurate that the remaining third, substantially comprises the same two parties nude in the bathtub together?

The Witness: Yes.

Judge Moldow: So that the entire film [90] consists of either the man and woman in bed, or nude in the bathtub, isn't that correct?

The Witness: Yes, approximately, yes.

Judge Moldow: Isn't that substantially similar to the method in which the sexploitation films that you referred to as lewd, proceed, where almost all the time that the spectator views the scene, he is seeing some of sex conduct?

The Witness: They are parallel but not alike at all because they are done in an entirely different spirit, and also they are absurd concoctions of plot which is exploitational, whereas the method here is to be very natural, very ordinary, matter of fact.

Judge Moldow: You say it is the spirit which distinguishes them?

The Witness: I think it is, and the fact that there is no affectation about the fact that the two people don't seem very much interested in either other, especially the woman seems quite bored, gives very little cooperation to the man.

The District Attorney: Mr. Tyler, I have [91] one or two further questions.

The Presiding Judge: This book, Sex Psyche et cetera In The Film, has it been published yet?

The Witness: The copies are off the press. The publication date is the 22nd of this month.

Q. Who is the publisher of that book? A. Horizon Press.

Q. How long is that book? A. Oh, it is about 250 pages. There is a copy of it. (Indicating)

Q. And, how many pages is the chapter, how long is the chapter devoted to the Blue Movie? A. I think it is about eight pages.

Q. Eight pages? A. Yes.

Judge Moldow: Is there any photograph taken from the movie, accompanying--

The Witness: (Interjecting) No, the book is not illustrated at all.

The District Attorney: I have no further questions.

The Defendant's Counsel: Your Honor, I [92] want to offer the book in evidence.

The Presiding Judge: Any objection?

The District Attorney: I have no objection.

The Presiding Judge: All right, received as Defendant's Exhibit A.

The Defendant's Counsel: I bought the book Saturday.

The Presiding Judge: You bought it?

The Defendant's Counsel: Yes.

The Presiding Judge: Defendant's Exhibit A in evidence.

(Whereupon the book, 'Sex Psyche et cetera In The Film", was marked Defendant's Exhibit A in evidence.)

The Presiding Judge: One question, if I may. Do you have any questions?

The Defendant's Counsel: No questions.

The Presiding Judge: I want to make certain I understand what you said in one area. You say you found the picture had a social value, social redeeming value. For what reason, sir?

The Witness: Because it represents an [93] attitude of modern youth towards sex, and I think that is very vital.

The Presiding Judge: Would you label it as the theme of the picture, the underlying theme?

The Witness: Yes, I really would.

The Presiding Judge: So this would be the quote cool end quote modern attitude of the modern generation towards the sex act?

The Witness: Yes.

The Presiding Judge: All right.

(Witness excused.)

The Defendant's Counsel: The only question I have is what time the Court closes down here.

The Presiding Judge: We are getting a little tired, and it is getting a little late, let us try one more witness anyhow.

The Defendant's Counsel: All right.

Court Officer Joseph Hughes: Stand up and raise your right hand, and face the Judge.

(Witness complies.)

Judge Moldow: Do you solemnly swear to tell [94] the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

Court Officer Joseph Hughes: Sit down, please. Give your name, address and occupation.

The Presiding Judge: Your name?

The Witness: Charles Winick, C-H-A-R-L-E-S-W-I-N-I-C-K, address 160 Riverside Drive, New York, New York. I am a professor of sociology at the City University of New York.

The Presiding Judge: Professor of Sociology?

The Witness: The City University of New York.

The Presiding Judge: All right.

CHARLES WINICK, witness called on behalf of the defendant, residing at 160 Riverside Drive, New York, New York, occupation professor of sociology at City University of New York, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Dr. Winick, have you had any occasion to deal with mass media? [95] A. Yes. I have spent a good part of the last 20 years studying the effects of mass media, especially on young people. The subjects I teach have to do with mass media. I spent two years preparing a report for the Joint Commission of Mental Health of Children, a congressionally funded agency, on the effects of mass media on the behavior and health of young people. In 1961 to 1967, I was chief consultant at the National Broadcasting Company television network on the admissibility of material to be shown on the television network. In 1957--

The Presiding Judge: You mean legally admissible?

The Witness: No, whether it was in conformance with contemporary standards, and the manner in--

The Presiding Judge: C.B.S.?

The Witness: N.B.C.

The Presiding Judge: N.B.C.

The Witness: (continuing) In 1957 I began a two year study supported by the Ford Foundation, on the taste and censorship which resulted in a book published in 1959, called [96] A Taste and The Censor. In 1964, I received the George Foster Peabody award for distinguished achievement and meritorious public service in television, for a book which I wrote on the effects of television on young people called For The

Young Viewer. From 1959 through 1961, I was the director of basic research for the J. Walter Thompson Company, the advertising agency, developing a program of research on the effects of mass communications. I have been asked by--

The Presiding Judge: The purpose of what?

The Witness: The effects of mass communications.

The Presiding Judge: Mass communications.

The Witness: I have been asked by, and am currently preparing, I have been asked by the President's Commission on Obscenity and Pornography, which is currently in existence, to submit a proposal to it for techniques for studying the effects of nudity in films on young people. I published about 250 articles in professional journals, and 10 books concerned--many of the articles and books [97] concerned with mass media. My last book which was called The New People, was published in April of 1968. It is particularly concerned with the changing attitudes towards sex in the United States. The longest chapter in that book deals with the presentation of sex in movies. I have, at various times, been a consultant to the U.S. Senate Subcommittee on Juvenile Delinquency in its investigation of pornography, and I have been consultant to the New York State Assembly, and various other legislative groups. I have spent a lot of time studying these subjects. I have taught them for about

20 years. Before coming to the City University, I taught at the University of Rochester, M.I.T., and Columbia and I have directed about 400 studies on the effects of mass media on young people. My articles have appeared both in professional journals such as Social Problems, publishing quarterly, and in film publications such as Films and Filming. I should mention that my doctorate is in sociology which I received at New York University in 1950. I am a [98] fellow of the American Sociological Association, and also a licensed psychologist in New York State.

Q. Now, Dr. Winick--

The Presiding Judge: Is that all?

Q. (continuing) --at any time has the United States Government ever asked you to testify on its behalf in an obscenity case? A. Yes, in the case of a film, I Am Curious Yellow, the U.S. Attorney asked me to testify for the film.

Q. Now, Dr. Winick, you--

Judge Moldow: Did you testify?

The Witness: I testified but not for the government, for the importer.

Judge Moldow: But you viewed the film?

The Witness: Originally at the request of the government.

Q. Now, Dr. Winick, are you aware of the dramatic change in conventional and unconventional sex as depicted upon the screen?

The District Attorney: Objection, Your Honor.

The Presiding Judge: Sustained.

Q. Are you aware, Dr. Winick, of the change in the [99] sexual climate, the films being produced today as against five years ago?

The District Attorney: Objection, Your Honor.

The Presiding Judge: Don't we know that as individuals, if there is a change?

The Defendant's Counsel: Well, if the Court will take judicial notice of the fact that there has been a change in both the conventional and unconventional sexual depiction--

Judge Moldow: You have been asking him are you aware it is a fact, and assuming the fact not in evidence. If you want to ask a question about the fact, I have no objection to it, but your questions are highly improper in form as far as I am concerned.

The Defendant's Counsel: Withdraw the question.

The Presiding Judge: Sustained.

The District Attorney: You are sustaining the question--

Q. Dr. Winick, did you see the Andy Warhol Blue Movie? A. Yes, I saw it last Thursday evening.

[100] Q. And, you saw the movie at whose request? A. At yours.

Q. And, when you saw this movie, Dr. Winick, was this movie shown to you and several others in a private screening room? A. Yes, at the Preview Theatre in the West 40's.

Q. Now, when you saw the Blue Movie, did you see any social value in the Blue Movie? A. Very much so. I think that the film presents a growing and important point of view about sexual behavior by a director who represents increasingly the views of a great many people, a film which enables people to explore their own attitudes in a constructive way, and represents an important statement about private life, and personal behavior, by a film director who many people are coming to regard as someone who speaks for them. I think that more and more people are looking to films for this sort of reinforcing of their views and attitudes which they previously got from novels, and other printed material. This film, has the merit that I suggested, and I also think that it has a certain amount of clinical interest in the presentation of two [101] different character types, a non-responsive woman who is quite a celebrity in her own way, and an aggressive fellow, and I think there is a great deal of clinical interest in the very realistic presentation of their sexual behavior, without any attempt to make it stylized or to build in artificial values, or to make it hokey and to titillate the viewers. I think none of these things are found in the film.

Q. Did you find this film sexually stimulating? A. Exactly the opposite. I would say the film is not aphrodisiac, it would dull the sexual interest because it makes the sexual behavior of the couple routinized, and not following the typical kind of crescendo approach of many movies with overpowering music building up to a climax, and then a shot of waves breaking on a shore, and that sort of thing. That sort of thing is what encourages the viewer's imagination to roam and feel free to be stimulated, if need be, but this was a flat and realistic approach, nothing for the imagination to do, and, therefore, it is so clinical, almost medical in the manner in which it presents sexual behavior, that my own feeling is that would clearly be a sexual depressant, [102] a non-aphrodisiac, in other words.

Judge Moldow: To everybody?
The Witness: To most people.

A. (continuing) The tawdriness of the surroundings, the lack of carefully selected costumes, the flatness of the image on the screen, the non-use of the usual long shot, medium close-up of movies, the lack of the make-up, you can see even pimples on the back of the girl, as I recall, and so forth, all of these things certainly make sex a less mysterious and provocative act, but a kind of mundane, a casual activity, and the fact that it takes so long, also serves to, I think, make it anti-sexual to most people.

The Presiding Judge: You said, excuse me, there was no room in this picture for the imagination to roam as to the sex act, is that what you meant?

The Witness: Yes, sir, in contrast--

The Presiding Judge: Well, actually, didn't you find that the sex act was performed most explicitly in the picture?

The Witness: Well, I am not so sure of that. In other words, I still think there was a certain [103] amount of ambiguity about what was happening because there was no close-up.

The Presiding Judge: That is you didn't actually see the male organ penetrate the vagina?

The Witness: Yes, that's right. I think, if I may be permitted, there was a certain amount of ambiguity about what had occurred, but--

The Presiding Judge: What impression did you get as to what occurred, Doctor?

The Witness: Well, I would say that it is likely that in fact they had engaged in sexual intercourse, but I would say that I couldn't be sure of it.

The Presiding Judge: Well, all right. Thank you.

Judge Moldow: Wouldn't you also say the intention of the film is to convey the impression that they had?

The Witness: I would say so.

Q. Doctor, did you find this film lewd?
A. No, not at all.

Q. Did you find it salacious? [104] A. No.

Q. Did you find any forms of unconventional activity in this film? A. Unconventional? Well, it isn't clear whether the couple is married. Presumably they are not married although they do say they are married jokingly, that they are for the purpose of the film, but apart from the fact that they are not married, seemingly engaging in sexual intercourse, there was no sadism, no fellatio, and so forth, so I would say it was a representation of straight sex with no perversions or attempt to hinder them.

The Defendant's Counsel: I have no further questions.

Cross Examination by the District Attorney:

Q. Dr. Winick, how many movies of the sort of Blue Movie type movie have you seen? A. Well, I don't know what you mean by that.

Q. I will reframe that. Withdraw the question. Have you seen any other Andy Warhol movies other than the Blue Movie? A. Yes.

[105]Q. How many others? A. Well, The Chelsea Girls, most recently.

Q. Have you seen any of the movies characterized as sexational movies, the movies that are displayed at 42nd Street and Eighth Avenue? A. Occasionally, yes.

Q. About how many of them have you seen?

A. I go to them occasionally in the line of duty, maybe two or three a year, perhaps, something like that.

Q. Would you differentiate between the movies of that type and The Blue Movie? A. Very much so because these movies try to present sexual behavior in a titillating manner, surrounding the activities with as many provocative situations and sounds and music, and removal of clothing, and so forth, as possible, and they have no, they are not trying to make a statement about the situation of contemporary men and women in this country today. They don't have poetical discussions, they don't have discussions on the role of the police in modern society, they don't have a discussion of Franz Klein (phonetic) as a modern artist, and I think the director was trying [106] to bring in these modern arts, Vietnam, the role of the police, and so forth, to indicate the relationship between sexual behavior and the larger political attitudes, and these 42nd Street movies in no way try to bring in such larger social considerations, or bring in political attitudes, and they surround sexual behavior with a lot of hocus-pocus and costuming, and so forth. The very art of the film is that, its lack of artifice, so I would say that it is totally different than the exploitation movies.

Judge Moldow: Don't those exploitation movies also carry out that theme by the kind of title that they give the film, as well, in order to attract an audience looking for titillation?

The Witness: The kind of--

Judge Moldow: The title being the name they give the pictures?

The Witness: Yes, I would say so, sir. They often have titles like Week-end Orgy and that sort of thing.

Judge Moldow: How about the title of this film, does Blue Movie have a connotation to you in the [107] film industry?

The Witness: Well, I don't know what the industry connotations are. I interpret the title as the artist's semi-jocular of what he is doing, just as you know that he is there in the room photographing, and yet you don't know that he is there. I think he called attention to himself several times in the course of the film, and I think that he used the title Blue Movie as a kind of satiric way to indicate that society, and many people, might think what he is expressing in Blue but the viewers wouldn't think it was blue.

Judge Moldow: And if it wasn't intended satirically, what could it mean directly, Blue Movie?

The Witness: The connotation of something that is frowned upon or prohibited; I don't know that to me it would mean specifically a stag film.

The Presiding Judge: Pornographic films?

The Witness: No, a film having sexual content. I wouldn't say that that would have connotation of pornography necessarily.

[108]Q. Doctor, before your last answer, you commented on a Vietnam police activity. What is your reason for bringing in this; because of conversation that came out of the movie itself, The Blue Movie? A. That's right.

Q. So it is your feeling that the conversation lends credence to the socially redeeming value of the movie, is that correct? A. No, I wouldn't say it lends credence to the socially redeeming value. I would say that the sort of free falling discussion of larger national concerns, personal concerns in Easthampton, the theft of a painting, the throwing back and forth from the present to the past to what is going to happen next week, this is the way people do think and talk in their personal lives, and intimate moments on the basis of what we know about this, and I think the film very sensitively caught this, and tried to present that in these intimate moments people may bring in discussions of a variety of different subjects, and drive to another subject without terminating one subject, and so forth. I think that is one of the things that make the film very impressive.

[109]Q. Doctor, if I asked you, could you relate to the Court as briefly as you can, as simply as you can, what you feel the theme of this movie was or is? A. I see the theme of the film to be that sexual experience may be a very lower case kind of situation without huge peaks and valleys of experience. It may be a relatively mundane activity, and not of any great consequence, an encounter between two people who have known one another, and the experience, however, is a

personal expression which is unique for the person, and which the person reveals himself. I think both the male and the female are telling a great deal about themselves while they are engaged in all this discussion and activity, and that would be for the viewer to see the extent to which he does not identify with these people, and the extent to which he can form a judgment that part of the behavior is clinical or pathological, and part is not, and so forth. Well, that is a complicated way of answering your question.

Q. From that, would it be fair to say that your opinion is that the theme of this movie is the portrayal of the sex act without the great highs and lows that could be a natural, real, not at times a very elevating or very [110] depressing state? A. I would, Oh, I think that would be a fair statement.

Q. Would it also be a fair statement, it really doesn't make any difference what they talk about while they were doing this act, they could have talked about World War II rather than Vietnam, none of that would have made any difference? A. I wouldn't say that. I would not try to estimate how most people would view the film based on my experience in interviewing thousands of people about their reactions to hundreds of films, and I have no idea what my reaction would be or other people's reaction would be if they were talking about something else. I can only evaluate my impression of what--evaluate my impression of what they are talking about, and they did elect to, choose to talk about the war in Vietnam, attitudes about the police, and so forth, and I think the fact that they did talk about this is extremely important. I have no idea what they might have talked about, they didn't talk about anything else, that is what they did talk about.

Q. Doctor, going back to your statement on direct [111] examination that you did not feel this movie was made with the idea of titillating the viewer? A. Yes.

Q. You expressed that idea, is that correct? A. Yes.

Q. You did not get the feeling when you were viewing this movie that there was at times during the film, a preoccupation with someone observing the acts that they were doing? A. There were at least two points, in one case the couple moved to permit a profile shot, and in the other case they referred to this movie, but I think that this is part of the attraction of the film within a film situation, and this is part of Warhol's message, that the relationship between art and reality is very blurred, and who knows when one begins and the other ends. I don't believe that there was in any way, in any place, any attempt to call attention to the sexual behavior in any titillating manner at all.

Q. But you do admit that at times there was a preoccupation from the two characters in this movie with the fact that they were being observed or, if you will, even, filmed?[112] A. There is some preoccupation?

Q. Well, they were conscious of this? A. On two occasions in the course of this relatively lengthy film, they communicated to the audience there was a camera in the room, but it was done very briefly in the first case to the profile shot, in the second case referring to this movie, the two incidents took maybe 15 seconds, something like that. I would say that is hardly any attempt to call attention to someone viewing in a titillating way.

Q. Doctor, your contention is that this performance was realism? A. Yes.

Q. That is the way it really is? A. One way.

Q. One way it could be? A. Yes.

Q. How does this realism fit in with the fact that these people are also acquainted with the fact they are being photographed while they are doing this act, they are being filmed, is that realism with two people in bed, they are being filmed; how does that fit in with [113] your argument? A. Not an argument.

Q. Excuse me, your statement? A. One of the themes in many films such as Blow Up and films of this sort, is that the boundary between the real and the fantasy, and between the film maker and the film is very blurred, and part of the satisfaction that the audience gets from these modern films is a feeling of ambiguity about the theme with respect to reality, as this really happens, in other words, or is the film maker there.

The Presiding Judge: Do you mean there was ambiguity in the film as to what they were doing?

The Witness: I would say there is no ambiguity as to what they were doing, sir. I would say that the relationship between the film maker, and the fact that there was a film being photographed, is presented in an ambiguous way.

The Presiding Judge: I don't understand your statement. I am sorry.

The Witness: Well, people come into a movie house to see a film, they know that somebody shot a film with a camera, somebody was there, [114] therefore was watching what the actors or performers or protagonists were doing while he was shooting the film, but we pretend these directors or camera men are not a part of it. The attraction of a number of modern films, this would be I Am Curious Yellow, is that the director communicates the fact that he is there making the film, and he wants you, the audience, to know that he is there making the film, and then he takes a number of steps away, and there you are viewing the film again. I think this game about where is the director and is he there would be the attraction of this modern group of films.

Judge Moldow: Is that an attempt to make the spectator identify with the director rather than with a protagonist?

The Witness: I think one of the satisfactions, sir, of many of these films is precisely that, that the audience gets a directorial satisfaction to some extent, and that is no more creative satisfaction than I think an audience gets looking at something on a screen.

Judge Moldow: Is that a voyeuristic satisfaction being substituted for a directorial satisfaction?

The Witness: That is possible, but I think [115] that it is more the identification with the artist and the director, than the peeking through the keyhold kind of satisfaction.

Q. Doctor, I think you communicated that this movie was in the trend of more realism in movies, would you say? A. I think all of Warhol's films appear to be stressing the lack of artifice, and I think the need to identify, the need to identify with the real, yes.

Q. It was your testimony that being able to see pimples on the back of the female actress, and the lack of fancy costuming or make-up, or much make-up, that all these things would tend to cause less titillation on the part of the viewer because it is more real, is that correct? A. I would say so, yes sir.

Q. Would you say as a flat statement that realism as opposed to the trumpets sounding and the music coming in, would in most cases never titillate the public to the degree that a movie with such things as that would? A. In general, I would say so, for the same reason that we know that the nude figure is far less likely to [116] titillate most people than the partially clothed figure. In other words, when the imagination is permitted to work, then people's emotional energy begins churning, and they begin to have fantasies, and ruminations, or when you see the nude figure, the pimples on the back, there is far less opportunity for the imagination to roam, and therefore the nude figure is almost necessarily less titillating than the partially clothed figure, which is the asexuality of most nudist camps.

The Presiding Judge: Most?
The Witness: Nudist camps.

Q. Sir, in other words, a picture of a woman totally nude sitting on a couch with no clothing on, would be much less titillating than a picture of a woman sitting on a couch with a very brief bathing suit on? A. Yes, absolutely, and fixed to that there is a study by the Institute of Sex Research on it and by the Commission of Obscenity and Pornography in which I mentioned that fact, that complete nudity is uniformally--I should say uniformally less titillating than partial nudity.

[117]The Presiding Judge: Did you ever read Anatole France's Penguin Isle?
The Witness: Yes, sir, I did.

Q. Doctor, you testified to the medical approach of this movie? A. Clinical.

Q. The word, I think, medical, was used? A. Is it medical or clinical? I think it was clinical.

Q. I think both words were used. Would you please elucidate further on this medical-clinical approach? A. Yes, I can very well see showing this movie to a class at medical school or a group of residents in psychiatry, and presenting these two characters as types, the female, the distant, aloof, non-responsive woman, and the energy getting sexually aggressive male trying to achieve his goal while the woman is not really cooperating with him in this. I think that there is material in this movie for many hours of lectures to such groups, medical students, psychiatric residents.

Judge Moldow: Would you present it to [118] a college group?

The Witness: No, of course not. I would present it to the groups of the sort I mentioned, people who had a legitimate interest in personal pathology.

Judge Moldow: A college group talking abut age level of between 18 and 22?

The Witness: Well, I wouldn't present it to a college group unless it were a highly specialized class in psycho-pathology or something like that.

Judge Moldow: You wouldn't present it to the general population between the ages of 18 and 22?

The Witness: Well, that would depend. I think that I would in general, I would have confidence that the nature of the film is such that there would not be--

Judge Moldow: Would you present it, though?

The Witness: You mean would I permit such people to see it or ask such people to see it?

Judge Moldow: Would you present it to such a group?

The Witness: Not to an undifferentiated--

[119]The Presiding Judge: Yes?

The Witness: I would say so.

Judge Moldow: Do you have reservations?

The Witness: Well, I hesitated for a moment, but on balance, I would say so.

The Presiding Judge: And, for what purpose would you present to such an undifferentiated group?

The Witness: That is why I asked.

The Presiding Judge: For clinical observation or study or general entertainment?

The Witness: Well, I don't know that I would accept those two categories.

The Presiding Judge: Well, I am asking you, if you would be so kind, as to answer whether which of those categories?

The Witness: Well, I have already said for clinical observation. It certainly has--

The Presiding Judge: Has a value?

The Witness: Has a value, and I would state that as an example of an important kind of theatrical film and I would say an entertainment film.

[120]The Presiding Judge: Thank you. Now, you said that the woman was not cooperative in this picture?

The Witness: Not to the extent that her boyfriend appeared to wish.

The Presiding Judge: Well, she did engage in what appeared to be sexual intercourse?

The Witness: Yes, that's right, sir, but--

The Presiding Judge: She did gyrate her buttocks as if engaging in the act, is that correct?

The Witness: Yes, sir, that's right.

The Presiding Judge: She did kiss and embrace him?

The Witness: Occasionally, yes.

The Presiding Judge: She did fondle the parts of his body?

The Witness: Yes, that's right.

The Presiding Judge: She did soak his penis in the shower?

The Witness: Yes.

The Presiding Judge: And raise it from a flaccid state to at least a semi-erect state?

[121] The Witness: Yes, but all of those--

The Presiding Judge: And you would say that was not cooperation?

The Witness: All of those things are true but there was a kind of distance and lack of involvement in it.

The Presiding Judge: Isn't that true in most male and female relationships, that the male is the aggressor, and that the female is the resistant one, the one who wishes to be the subject of the aggression, isn't that generally true of females?

The Witness: I would say that.

The Presiding Judge: They want to be the one that pursued?

Judge Moldow: Maybe he is getting out of that field, he is in the mass media field.

The Witness: No, sir. In chapter 9 of this last book of mine which I mentioned called The New People, I have a very long discussion on the changing female-male sex role.

The Presiding Judge: You mean they are changing it?

[122]The Witness: Well, I think they are changing in a direction other than that which you just summarized, namely, that certainly the trend as we gather from the Kinsey studies of the 1940's and their repetition in 1967 is for woman to be more emancipated, if you will, more informed, more free-spoken, and so forth, and certainly that the direction which I believe the country is taking.

Q. Well, doctor, would you say this was a normal, if there is such a thing, was there a normal relationship between these two people in bed, or would you say it was somewhat abnormal?

The Presiding Judge: Well, that is a very ambiguous question. It depends on what is normal.

A. Yes, I would hesitate to reply.

The Presiding Judge: I think that is impossible. I think we can agree, we know that the sexual relations between male and female are rather normal.

The Witness: Yes.

Q. Do you think their responses were normal? [123] A. In the particular relation, pre-coition, it is the traditional kind of activity, and not any of the various perversions, so to that extent what we saw is normal activity.

Q. Would you say that their response to the acts of intercourse were usual and normal? A. I don't think it is possible to answer that, I think these people are presented as protagonists because they are unusual in some way, and therefore to that extent they are atypical, they wouldn't be performing a movie if they were people in the street.

Q. Doctor, did you have any trouble at any time understanding what was being said in the movie? A. I don't think so.

Q. Well, as far as the technical aspects of the film, the sound track, could you always understand what was being said by the actors? A. Certainly, most of it.

The Presiding Judge: All of it?

The Witness: I am sure there was a few bits that I didn't, I couldn't understand.

Q. And you would attribute that to what, the [124] movie itself, the sound track? A. It might have been the sound tract, but Warhol makes a point of trying to convey reality as it is, and the lack of focus of a number of his shots, I would attribute to the same reason, namely, that he is not interested in artifices, that he wants to present it like it is. It may be a particular print.

The Presiding Judge: Weren't there sections of the film that you saw, sir, where the lips were moving and the actors were apparently speaking but the sound did not come over?

The Witness: There were a few such sections. I attributed that to the particular print that I was viewing.

The Presiding Judge: There was a defect in the print?

The Witness: That is what I thought.

The Presiding Judge: Yes, all right.

Q. Did you detect any story or plot in this movie? A. No, it is not a film with a beginning, middle and end plot. That is one--It begins abruptly and ends abruptly.

[125]Q. How about a message, did you get any message out of it, did you come away with any message? A. No. I don't believe Mr. Warhol makes films with messages.

Q. Did you come away with a theme? A. A theme, yes, but a theme is not a message, and to paraphrase what the theme of the film means in a couple of sentences, that is like saying Gone With The Wind is a story about a woman whose plantation burns down, who finally gets a plantation back. I think it is unfair, in other words, to take a work of art in one medium and try to summarize it.

Q. I think you did make an attempt earlier to? A. Yes, I did try to summarize the theme, right.

The District Attorney: I have no further questions.

The Presiding Judge: I have a question, sir. You have said that the picture, in your opinion, was not lewd?

The Witness: Yes, sir.

The Presiding Judge: What do you mean by lewd?

The Witness: By lewdness, I construe the [126] presentation of substantive material which presents sexual content in an offensive or pathological or titillating manner. I don't believe that is true of this film at all.

Judge Moldow: Or any part of this film?

The Witness: That's right.

The District Attorney: One more question. Excuse me, just a minute.

The Presiding Judge: Go ahead.

Further Cross Examination by the District Attorney:

Q. Doctor, is it your conclusion an act shown in a realistic setting is realism, that this movie would in no way ever titillate the public?

The Defendant's Counsel: Objected to, Your Honor, he has answered the question twice.

The Presiding Judge: Well, this is cross examination, we will allow it.

A. What do you mean an act, can you explain what you mean?

Q. One of your definitions of lewdness is that it would titillate the public? [127] A. That's right.

Q. You also feel that that movie shows the act of intercourse in a realistic manner? A. Yes.

Q. Therefore, would it be fair to say that that movie depicts the act of sexual intercourse in a realistic manner, assuming a realistic manner there would never be any titillation of the public? A. I don't think that is a logical inference. What I said, because we can't talk about a hypothetical movie without a hypothetical realistic presentation of sex. I can obviously talk about this film which exists, and we have seen it, and I have commented on how I think the realism of this sexual presentation will affect most people.

The Presiding Judge: Excuse me?

The Witness: I would say this was not lewd because it is a realistic presentation of an act of coitus and does not seek to present that act in an offensive or pathological or titillating manner.

The Presiding Judge: Well, you are saying that an act is of a realistic act of sexual intercourse, [128] it does not titillate?

The District Attorney: That is my question.

The Presiding Judge: Is that your statement, doctor?

The Witness: As presented in this film, it does not titillate.

The Presiding Judge: How is it different in this film, what is the distinction characteristic of this film that leads you to conclude that the realistic presentation of an act of intercourse does not titillate?

The Witness: Well, sir, it is impossible to discuss how a hypothetical presentation--

The Presiding Judge: This isn't hypothetical. You saw the picture?

The Witness: Yes.

The Presiding Judge: Saw the act of sexual intercourse?

The Witness: Yes.

The Presiding Judge: You say it doesn't titillate?

The Witness: Yes, sir, that's correct.

[129] The Presiding Judge: Why?

The Witness: Because--

The Presiding Judge: What do you base that on?

The Witness: I am trying to empathise

with how most people would respond in feelings with seeing this film.

Judge Moldow: How old are you?

The Witness: Forty-seven.

Judge Moldow: Are you trying to empathise with the 20 year old population and the 30 year old population?

The Witness: I am talking about most people, and I have interviewed over 20,000 in the past 12 or so years on their responses to movies, and I think I have an impression of how different age groups did respond. Obviously, an older person, there are age differences and responses to this kind of material.

Judge Moldow: Do you measure their response in any other way but by taking ipse dixit?

The Witness: Yes, sir. In one study, I conducted, on A Man With A Golden Arm which appeared [130] in an article in the Journal of General Psychology in 1963--

Judge Moldow: This was at your case?

The Witness: Well, a film dealing with drugs. What I did, was to administer a questionnaire on attitudes toward drug use to several thousand young people before the film was released, and six months later I administered the same questionnaire, and some people had seen the film and some hadn't, and I compared the differences and I specially used objective measures such as this, wherever possible, of course, rather than just ask people what do you think or how does it hit you, because people often have difficulty in discussing intimate subjects like sexual material or their own responses to such material, or they may have fantasies, or they do not have the ability or desire to put into words, and therefore we try to use objective measures, questionnaires data, and so forth.

Judge Moldow: Excuse me. Aside from the narcotics situation in the film you described, did you ever use that testing device in the film that had [131] contents of a sexual nature?

The Witness: No, that kind of an elaborate procedure.

Judge Moldow: Thank you.

The Presiding Judge: Yes.

Q. You didn't engage any groups of any other people for any particular movie, The Blue Movie, did you say? A. No, I think that any such test would involve a large sample of population, and obviously under the present circumstances, it hasn't been possible to get a reaction from a large sample of the population.

Q. Now, I will ask this question again because I don't think it has been answered. Is it your contention that a realistic showing of an act of intercourse would not titillate the public, yes or no?

The Presiding Judge: The general public?

The District Attorney: The general public?

The Defendant's Counsel: I object to that, Your Honor, on the ground the witness has testified that in this picture this act would not titillate the general public.

[132] A. I think that is honestly the best I can say.

The Presiding Judge: All right, we will overrule the objection but take your answer. All right, anything else of this witness?

The District Attorney: I have no further questions.

(Witness excused.)

The Presiding Judge: All right, the Court will recess until 10 o'clock tomorrow morning. We have some other matters.

The Defendant's Counsel: Excuse me, what time is that tomorrow?

The Presiding Judge: Ten o'clock. Is that satisfactory with everybody?

The Defendant's Counsel: Yes, Oh, sure.

The Presiding Judge: All right, continued until 10 A.M. tomorrow.

The Defendant's Counsel: One question, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: Would it be necessary, in the light of the question that Judge [133] Moldow asked me earlier, before the filming inside, where Mr. Parker Tyler saw a film a year ago, do you want me to testify on the record that it is an identical print?

The Presiding Judge: Well, if you will

state that on the record, and no objection, we will take your word for it.

The Defendant's Counsel: All right, will you take a stipulation?

The District Attorney: That that was the same?

The Defendant's Counsel: The one that Dr. Winick saw--

The Presiding Judge: The same one that we saw, People's 1?

The Defendant's Counsel: Yes, a duplicate print, a print that I have in my office.

The Presiding Judge: All right.

The Defendant's Counsel: All right, now.

The Presiding Judge: Thank you.

The District Attorney: Your Honor, that issue I did not argue, nor will I stipulate it is the same thing. I think it goes to the weight [134] whether or not it is the same but--

The Presiding Judge: Well, we will take Counsel's word for it.

The Defendant's Counsel: I am not talking about Mr. Tyler a year ago, I am talking about Dr. Winick now.

The Presiding Judge: All right.

The Defendant's Counsel: All right.

(Court adjourns for day.)

[135] September 17, 1969

Court Officer Joseph Hughes: Calendar number 103, Docket B19858, Saul Heller, charged 235.05.

The Defendant's Counsel: Good morning. Ready, Your Honor.

The Presiding Judge: Good morning. All right, proceed. Gentlemen, the case is with you, Counsel, I believe.

The Defendant's Counsel: Thomas Phillips.

The District Attorney: The People renew their application to exclude all other witnesses.

The Presiding Judge: All other witnesses, step outside until called.

The Defendant's Counsel: There are no other witnesses except the defendant after this.

The Presiding Judge: All right.

Court Officer Joseph Hughes: Stand up, raise your right hand and face the Judge.

(Witness complies.)

Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

[136] The Witness: I do.

Judge Moldow: Be seated, give your name, and address, occupation. Keep your voice up.

The Witness: Thomas Phillips, my address is 3 Cooper Place, Weehawken, New Jersey. My occupation is a writer.

THOMAS PHILLIPS, witness called on behalf of the defendant, residing at 3 Cooper Place, Weehawken, New Jersey, occupation, writer, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Mr. Phillips, for whom do you work? A. I work for the New York Times.

Q. How many years have you worked for the New York Times? A. Slightly over four years.

Q. What type of work do you do for the New York Times? A. I write radio news casts for WQXR. In addition, I am a free-lance writer and write articles [137] for newspaper publications, the Times, the Times Magazine, the Village Voice, Rolling Stone, and Pop and New York Scenes Magazine among others about the arts, film, theatre, popular music, books.

Q. Now, did you write any articles for the Village Voice? A. I wrote an article recently about the movie in question.

Q. Now, Mr. Phillips, how old are you? A. Twenty-seven.

Q. Are you married? A. Yes, I am.

Q. Do you have any children? A. Two children.

Q. When was the first time I talked to you, Mr. Phillips? A. Just last week, I believe.

Q. Now, did you see the movie, Andy Warhol's Blue Movie, prior to my talking to you? A. Yes, I did.

Q. Where did you see the movie? A. I saw it at the Garrick Theatre, Bleeker Street, [138] approximately two months ago.

Q. As a result of seeing that movie, did you have occasion to write an article on that movie? A. Yes, I did.

Q. And where was that article published? A. It was published as a letter in the Village Voice, although I sent it as an article.

Q. And, as a result of seeing this movie, did you form an opinion as to whether this movie had any social value? A. Yes, I did.

Q. What was your opinion? A. My opinion was that it did have social value.

Q. When you say it did have social value, what did you see in this movie? A. I thought that the movie was basically about the political situation in this country today.

The Presiding Judge: Hold that just a minute. You say it was basically--

The Witness: (interjecting) The basic theme of the movie was about the political--

The Presiding Judge: The basic theme of [139] the movie was what?

The Witness: About the political and social situation in this country today.

The Presiding Judge: All right.

Q. What do you mean by that, Mr. Phillips? A. Well, first of all, I think I know that the characters in the movie spent a great deal of time talking about subjects such as taxes, the war, presidential election, police. I think that their conclusion was very clear, that they felt along with many other people in this country, that they had been somehow cheated, that their votes and their taxes, had not only been wasted, but had actually been turned against them, and in connection with this, I feel that the movie offered not only an outline of their political and social dilemma, but also a solution of sorts.

The Presiding Judge: Also of what?

The Witness: Also a solution in personal terms. I feel that--

Judge Tolleris: What solution would you say?

The Witness: The viewpoint expressed by the movie, I would say, is that in the face of political [140] powerlessness, in the face of evil over which there is seemingly no control, the thing to do is to stay home, refuse to contend with the situation, and find what happiness you can in private personal relationships.

Q. Now, Mr. Phillips, did you find this movie to be lewd? A. No.

Q. Did you find this movie to be salacious? A. No.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: Cross.

Cross Examination by the District Attorney:

Q. Mr. Phillips, how many movies of this sort have you seen? A. What do you mean of this sort?

Q. How many Andy Warhol movies have you seen? A. Five, six, seven, quite a few.

Q. Have you seen any other of the sex type movies that are played on 42nd Street or Eighth Avenue? [141] A. A couple quite a while ago.

Q. You felt that these ideas about Vietnam and the political situation and taxes, these all came from the conversation? A. Right.

Q. Did you learn anything about these? A. Well, let's say that I didn't learn things in terms of facts, I learned, but I think it was, well, it was a dramatic, it was a presentation of feelings which are on a large scale in this country. I am not saying these people were brilliant or expressed their ideas any better than anyone else, but these ideas did have some substance to them.

Q. When you saw the movie at the Garrick Theatre, could you always hear the conversation? A. No, not always. No.

Q. Why not? A. Well, it is what is called natural sound, in that you don't--

The Presiding Judge: You don't hear natural sound?

The Witness: No, natural sound is the way [142] you would normally hear a conversation in a room. You don't always pick up every word, it is a technique that is used quite a bit.

Judge Tolleris: A technique or bad sound track?

The Witness: No, I think it is more a technique, you know, in the different reels the sound track was on a different level, and the last reel of the movie the sound track was very close up. In the second reel, the interior scene, it was kind of far back, I think that was.

Judge Moldow: The sexual intercourse scene took place nowhere in the second reel?

The Witness: I may have my reels mixed up.

Judge Moldow: The sexual intercourse was in the first reel, that was accompanied, I think, where the parties were entirely nude through the whole reel, were talking casually.

The Witness: I am sorry, I had my reels mixed up.

Judge Moldow: The sexual intercourse was on the first reel, that was a past coital relaxed [143] state where the parties were entirely nude throughout the whole reel, were talking casually.

The Witness: I am sorry, I had my reels mixed up. Let me say then, I am sorry, that the sexual intercourse in the beginning was far off and you couldn't pick up all of it, I think that went along with the whole aesthetic approach to the scene in which he made it somewhat remote, and also used the color, the color which apparently had some kind of a slide over the camera, and I think that both of these devices had a tendency to move the scene back from direct confrontation with the viewer, with kind of a distancing device which I had thought it was kind of effective.

Q. Now, Mr. Phillips, you previously on direct testimony stated that the theme, to you, embodied the idea that you can't contend with the forces outside, the best thing to do is stay at home, and that to you was essential--was the solution offered by the film? A. Well, it is a solution, yes, right, I think so, yes.

Q. Could you be a little more specific as to how [144] you arrived at that conclusion? A. Well, the whole movie is about that.

The Presiding Judge: Is about what?
The Witness: Well, what the movie--
The Presiding Judge: Just a minute. You said the whole movie is about that, and I said about what?
The Witness: Okay. Okay. What is the movie? The movie is a day spent, more or less a day spent, between two people.
The Presiding Judge: Engaging in sexual intercourse?

The Witness: Engaging in sexual intercourse, and a great deal more than that, engaging in a great deal of conversation.

The Presiding Judge: A great deal of conversation?

The Witness: I would say a great deal of conversation.

The Presiding Judge: Well, now, how much time did the whole film take?

The Witness: I believe it took an hour and 45 minutes, is that correct?

[145] The Presiding Judge: And, how much of that time was engaged in conversation?

The Witness: I did not time it, but I would say the bulk of it.

The Presiding Judge: The bulk of it?

The Witness: More than half of it.

The Presiding Judge: The bulk took place about what?

The Witness: About Vietnam, taxes, and--

The Presiding Judge: No, general conversation.

The Defendant's Counsel: I object to that, Your Honor. The question, may I say this, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: The question was the bulk of it took place as the conversation. Now if Your Honor is going to go into specifics, would you go a little more slowly so the witness carries what Your Honor's thought is?

The Presiding Judge: All right. The conversation that took place, Mr. Phillips, you said had to do, as I understood you, you said a great deal of the time was devoted to conversation [146] about the political and social situation, is that what you said?

The Witness: Yes, I did say that.

The Presiding Judge: All right. Now, about how much time was devoted to that type of conversation as you recall it?

The Witness: I would say about half an hour.

Judge Moldow: In other words--

The Witness: (interjecting) following the intercourse.

Judge Moldow: The relaxed reel, the second reel?

The Witness: Yes, between the bed and the bathtub was the political conversation.

Judge Moldow: Now, the third reel, the bathtub sequence when the two parties were nude in the bathtub for almost the entire reel, and wouldn't you agree that during this reel there was no political conversation?

The Witness: No, that was quite a whimsical reel.

Judge Moldow: Well, it was non-political?

[147] The Witness: Yes.

Judge Moldow: It was non-social as far as the conversation relating to any points of view?

The Witness: My point is, that I am--

Judge Moldow: No, I just want your agreement as to this.

The Witness: Yes, I do agree with that. If I may say so--

Judge Moldow: No, please, I will have to ask you to answer my question. The first reel, do you not agree, was spent by these two people entirely on the bed, that was the backdrop for their activities?

The Witness: No, there was a rather lengthy sequence before they ever got onto the bed.

Judge Moldow: Where were they sitting, on the edge?

The Witness: Sitting on the edge of it, walking around, yes.

Judge Moldow: After a few minutes of that, isn't it accurate to say that they got on their bed, and they removed their clothing, and that they were on that [148] bed for the rest of that reel, culminating in an act of sexual intercourse where explicitly the audience saw the female astride the male, and assisting his erect penis into her vaginal area?

The Witness: Yes.

Judge Moldow: Is that correct?

The Witness: Yes.

Judge Moldow: Was there a conversation of a political or social type during the first reel that we are talking about?

The Witness: I don't recall any of any length.

Judge Moldow: I think that is accurate. In other words, it was confined to the second reel which was possibly one-third of the movie. During that second reel, isn't it true that the parties were nude the entire period of time?

The Witness: That is true but I didn't think that was particularly important.

Judge Moldow: But it was true?

The Witness: Yes, it was true.

Judge Moldow: All right. [149]

Q. Mr. Phillips, did you get this idea that the basic solution to all these problems was to stay at home because these two parties were in fact there in a home the entire film, is that how you came away with the idea? A. No, that metaphor is quite optional. The point is that what they did, they resolve it at two points, not to vote because they felt their votes didn't do any good, the woman talked about voting for Johnson in 1964, the man talked about voting for Adlai Stevenson in 1952. At another point, they resolved not to pay their taxes, and I think the general conclusion they draw from their position in the political situation, the best thing to do is not to be involved with it in any way, not to try to struggle to change it because of their condition of powerlessness.

Judge Moldow: That second reel, according to your testimony, could be released as a complete entity?

The Witness: No, I think my point is, and perhaps I didn't make it well enough, is that there is an organic connection between the sexual intercourse scene and the political scene. [150] To express it very succinctly, that I think the sexual intercourse was an emblem of the alternative to struggling against corruption, and disorder in society.

Judge Moldow: And, of course, the manner of this portrayal could take endless possibilities as to presentation?

The Witness: I think it was present in the best possible way in this context, because it was, so it was so realistic, it was so non-hysterical, and in my view it was so normal, and positive.

The Presiding Judge: Normal and positive?

The Witness: I think it was a positive view of sexual intercourse.

Judge Moldow: It was a positive view of sexual intercourse?

The Witness: True.

Q. What do you mean by the word positive? A. I think that it was--all right, let's change the word, and I will say it was a very benign view of sexual intercourse in a friendly case.

The Presiding Judge: Most cases, aren't [151] they in most cases of sexual intercourse, are friendly, aren't they, except rape cases?

The Witness: I don't know. I think this was--I don't know. I am not familiar with all cases of--

The Presiding Judge: You are not what?

The Witness: I am not familiar with all cases of sexual intercourse.

The Presiding Judge: Well, in your experience, do you find that the usual act of sexual intercourse engaged in, by consentual adults is a friendly relationship?

The Witness: I do, and that is why I said that I felt this was a very normal instance of sexual intercourse.

Q. Mr. Phillips, you said this movie was not lewd, is that correct? A. That's correct.

Q. What is your definition of lewd? A. I would say that lewd means to me appealing to very--appealing to sexual interests in a very narrow way, in a very impersonal way.

[152] The Presiding Judge: Is it limited to sex?

The Witness: The word lewd, I believe that was--my impression of the word lewd is that it has to do with--

The Presiding Judge: Only with sex?

The Witness: That was my impression.

The Presiding Judge: Can it be a lewd act without involving sexual intercourse?

The Witness: I suppose I had the impression that the word lewd dealt directly with sex, somehow.

The Presiding Judge: I am asking what your view of the word is?

The Witness: To take another word, I think you have obscene acts that couldn't involve sex.

Q. Can you have lewd acts that do not involve sex? A. I don't know.

Q. What type of a movie would be lewd to you?

The Defendant's Counsel: That is objected to, Your Honor. We are on one movie, and that is the one movie we are here on today.

[153] The District Attorney: This defendant has stated that he has seen other movies of this type.

The Presiding Judge: Well, by a majority of the Court, the objection is overruled. Judge Tolleris dissents and votes to sustain the objection.

Judge Moldow: I would like to know what the witness means when he says something is lewd or not lewd.

The District Attorney: I will present the question.

Q. This movie was not lewd to you? A. Yes.

Q. Why was it not lewd to you? A. Because it did not present sexuality in a narrow impersonal way.

Judge Moldow: What would you consider lewd?

The Witness: I would consider a movie lewd in which there was attempt made as to characterizations or any attempt beyond pure simple straight depiction of straight sex where there was no kind of human involved at all, no kind of human relationship between the audience and the people on the screen.

[154] Judge Moldow: And if there was such an involvement, and such a relationship, then it wouldn't matter in what manner the sex was portrayed, no matter how explicit, whether you used telephoto lens when you showed genital parts, no part of that would matter?

The Witness: I couldn't actually say because we are just dealing with this movie.

Judge Moldow: All right, thank you.

Q. Have you ever testified before as to social redeeming value of any obscene material? A. No.

Q. Did you feel there was a plot line at all to this? A. Not in the conventional sense, all I felt there was a dominant theme, and I think that is what is required in a movie, not a plot.

Q. Would you please restate the dominant theme again? A. I think the dominant theme had to do with the political and social situation in this country today, and a possible solution to the political dilemma of people [155] finding themselves in a feeling of powerlessness to deal with institutions they feel are evil.

The Presiding Judge: You got that impression from the film?

The Witness: Yes, I did.

The Presiding Judge: All right.

Judge Tolleris: Was the sexual part of the film necessary?

The Witness: As I said, I think it is an organic connection to the political and social contents of the film, and as I expressed it before, I think it is in a sense an emblem of the alternative to struggling with evil and corruption.

The Presiding Judge: You mean if you can't fight evil and corruption, let's indulge in sex, is that it?

The Defendant's Counsel: That is objected to, Your Honor.

The Witness: No.

The Presiding Judge: I want to ask him--

The Witness: (interjecting) No, I would say--

The Presiding Judge: Excuse me. Counsel made [156] an objection. I overruled the objection and I would like to know whether that is what you feel, that is what you think it is about?

The Witness: Could you rephrase it again?

The Presiding Judge: You say, you justify this picture as a decent picture, suitable for display in public because you say it is a revolt against the futility of the tax situation, the war situation, and political situation?

The Witness: Yes.

The Presiding Judge: And you say that is all right, that is redeeming, has a redeeming social value? Did you express that resentment in your objection to wars, and the political situation and taxes, by indulging in the sex act, is that your thought?

The Witness: Not quite.

The Presiding Judge: Well, would you please make it explicit?

The Witness: Yes, I would say that the alternative to struggling against these things is not the sexual act in a limited sense, but personal [157] intimacy in a broad sense. I feel the movie is not about sex but with your personal sentiments of which sex is a major part, but I feel that the movie is about a relationship, and that is what it is all about, it is two people together.

Judge Tolleris: You say it is symbolic, that would be symbolic of a lot of other things?

The Witness: Yes, I would use that word.

The Presiding Judge: Couldn't that symbolism, in your view as a critic, be portrayed without all of the anatomical details of the sexual act indicated in two scenes?

The Witness: I suppose it could, but my view is that it was done in the best, most tasteful way, the way it was done.

The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

[158] The Witness: I say within the context of this movie, I think it was well handled.

The Defendant's Counsel: Now, Your Honor--

The Presiding Judge: Wait a minute, wait a minute, Counsel.

The Defendant's Counsel: Your Honor, I do not mind the Court questioning the witness, but at this point you have not given the witness an opportunity to respond to your questions before asking him another one.

The Presiding Judge: I am sorry if I have done that. (to the reporter) Mr. Oppenheimer, will you read back my last two or three questions there, and the answers.

(Whereupon the Reporter read back the following:

"The Presiding Judge: Well, would you please make it explicit?

The Witness: Yes, I would say that the alternative to struggling against these things is not the sexual act in a limited sense, but personal intimacy in a broad sense. I feel the movie is not [159] about sex but with personal sentiments of which sex is a major part, but I feel that the movie is about a relationship, and that is what it is all about, it is two people together.

Judge Tolleris: You say it is symbolic, that would be symbolic of a lot of other things?

The Witness: Yes, I would use that word.

The Presiding Judge: Couldn't that symbolism, in your view as a critic, be portrayed without all of the anatomical details of the sexual act indicated in two scenes?

The Witness: I suppose it could, but my view is that it was done in the best, most tasteful way, the way it was done.

The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

[160] The Witness: I say within the context of this movie, I think it was well handled.

The Defendant's Counsel: Now, Your Honor--")

The Presiding Judge: Read back before Counsel made his objection there. Repeat that question.

(Reporter read back the following:

"The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

The Witness: I say within the context of this movie, I think it was well handled.

The Defendant's Counsel: Now, Your Honor--")

The Presiding Judge: Let me withdraw that question and say this. Could you say that the depiction, the photographic depiction of the intercourse and the manipulation of the male's private organ, was [161] a tasteful way of showing the actor's dissent with taxes, war and politics?

The Witness: I think that it was a tasteful way, and I base this on other reasons.

The Presiding Judge: All right, I just want to get your thinking. Thank you.

The Defendant's Counsel: May I ask the witness to continue his explanation, Your Honor?

The Presiding Judge: Yes. We have no objection to that.

The Defendant's Counsel: All right.

The Witness: Well, I feel that one of the major reasons that I felt it was tasteful, and more tasteful than the sex scenes one generally sees in movies which do not include genital organs, was that it was so realistic that it was relatively normal compared to the hysterical and exaggeration that appear in the cleverly censored sex films.

Judge Moldow: Do you prefer to see genitalia during sex scenes in movies?

The Witness: I prefer, yes, I would rather see it than a cleverly cut scene with all kinds of [162] mysterious implications.

Judge Moldow: All right, we have your view.

The Presiding Judge: Go ahead.

Q. Mr. Phillips, if the conversation had been different, if they had talked about other things, would that have made a difference?

The Defendant's Counsel: Objection as not being relevant.
The Presiding Judge: Sustained.

Q. You say that these problems of Vietnam and taxes, and solutions, as being one of the acts of sexual intercourse or intimacy between people, these are general problems of the public, everyone is conscious of these? A. A great number of people.

Q. And this is a solution to these, if you are faced with a frustration and the outside world problems, there is a solution? A. A solution.

Q. Would you have any compulsion about showing this movie to anyone, any member of the general public? A. Well--

Q. These are problems, this is a solution to problems? [163] A. Are you talking about age groups?

Q. First, age groups? A. Well, I don't think I would show it to someone---well, I think it is for adults, the subject matter is only for adults. A. Over 21?

The Presiding Judge: Excuse me, what age do you consider being an adult?

The District Attorney: Your Honor, could I conduct a cross-examination with more than two or three questions? Every time I ask one question, I only get one question at a time.

Judge Moldow: Do you feel--

The District Attorney: (interjecting) Yes, I do.

The Presiding Judge: I beg your pardon. Go ahead. Of course, when you ask a question, Mr. District Attorney, and the answer is left up in the air, the Court feels it incumbent to find out what we are talking about.

The District Attorney: I never get--

The Presiding Judge: If you will pardon me, [164] when the witness talks about adults, we would like to know what he means by an adult.

The District Attorney: I think I would like to know, too, and I can ask that.

The Presiding Judge: All right, you ask him.

The District Attorney: I will.

Q. What do you mean when you say adult? A. I believe the definition, the legal definition in this state is someone over 17 years old. That is good enough for me.

Q. So you would show it to any cross-section of the public? A. Yes, I would. As a matter of fact, I think this is a better sex movie to show to young people say between the ages of 18 and 22, than any other I have seen, because it is the most realistic and the most benign, as far as its outlook on sex is concerned.

Q. Without that act of intercourse, do you think this movie would have had--would have portrayed the theme that you say it portrayed, if it didn't have any act of intercourse?

> [165] The Defendant's Counsel: Your Honor, I object.
>
> The Presiding Judge: Yes, it is sustained.

Q. Well, was this act of intercourse, was it the culmination of the solution, right to the problem? A. Not--the relationship was the solution, not the intercourse. The intercourse was part of the relationship.

> The Presiding Judge: What was the relationship?
>
> The Witness: I think it was a very close, affectionate relationship, there was a great deal of irony on the surface of that relationship.
>
> The Presiding Judge: Were they married?
>
> The Witness: No, I don't believe they were, no, but I think that intimacy is possible, well, we all know that intimacy is possible without marriage.

Q. You detected a real intimacy between these two people? A. Yes, I think I did, yes.

Q. Did you, at any time, feel that the actor and the actress were sharing this little scene of intimacy with anyone else as you watched the movie? [166] A. Are you talking about the director?

Q. The Director, for instance? A. Well, it was being filmed, yes, but you know what is on the screen, what we have to talk about is what is on the screen not what happened at the time.

Q. Well, do you think there was a preoccupation as they were looking in this scene, do you think there was a preoccupation at some times in their minds that they were being observed by someone, maybe the director? A. There was evidence that they were aware of the director.

Q. What was the evidence? A. They spoke to the director a couple of times.

Q. When the bell rang, did you hear the bell ring? A. There was a telephone, I believe.

Q. The telephone call, was that for the director, too? A. No, I think there was a telephone--

Q. So that wasn't supposed to be the director, that was just a possibility that there was-- A. (interjecting) I think that was just by chance.

Q. Did anyone else enter that apartment besides [167] the director, that you can surmise? A. I have no idea.

Q. So, in other words, every time their attention was attracted towards-- A. (interjecting) the camera--

Q. (continuing) --towards the camera, only because of the director? A. I have no idea.

The District Attorney: I have no further questions.

The Defendant's Counsel: No questions, Your Honor.

The Presiding Judge: I may have one. The so-called discussion about taxes, war and politics, did that not take a very short time in the film?

The Witness: I am not aware of how much actual chronological time it took. I believe it took--

The Presiding Judge: Oh. Will you excuse me? You will agree there were three reels?

The Witness: Okay, right.

The Presiding Judge: Will you agree to that, [168] that the first reel was about twice the length of the other two reels?

The Witness: I am not aware of that.

The Presiding Judge: You are not aware of that?

The Witness: No.

The Presiding Judge: Now, the so-called discussion of taxes, war and politics, that wasn't really an exchange of ideas between the two people, was it?

The Witness: It was an exchange, not just of ideas, but of feelings they had.

The Presiding Judge: They just spoke about the facts, that the male made certain statements about not voting since Adlai Stevenson's defeat and he wouldn't go to Viet Nam?

The Witness: Right.

The Presiding Judge: And the girls also made a similar statement about Johnson, and somebody, I think, made a statement about Lindsay?

The Witness: Yes, also a discussion about an incident in which he felt harassed.

The Defendant's Counsel: Your Honor, again, [169] I would just ask Your Honor, if you are going to interrogate the witness, which is perfectly all right, please give the witness an opportunity to answer the question.

The Presiding Judge: Counselor, if I may interrupt you, I like an answer to the question, and when I feel that the question has been answered that is it. I do not want him; if I want him to expound further, I will ask him.

The Defendant's Counsel: May I just then, put on the record, Your Honor, at this point, that during the course of the examination of each of the three of the witnesses put on the witness stand, by the defense, there has been more than 75 per cent of the examination, on cross-examination, conducted by the Bench.

The Presiding Judge: Well, you may put it on record. Whether that is a fact, is something else, the record will disclose.

Judge Moldow: We have to take note of the facts, that this is not the ordinary type of criminal case where we have to listen to witnesses [170] who are there, and the Court was not there. The judges all saw this film, and that is what we are talking about.

The Defendant's Counsel: No doubt about it, Your Honor.

The Presiding Judge: And we are trying to get this witness' views on certain things that we observed in the film. When we ask a question, and the witness answers the question, then seems to go on to something else, I think it is proper for the Courts to stop the witness at this point.

Judge Tolleris: I do not think the Court has been cross-examining, merely asking questions for clarification, and information which is relevant to the issues involved.

The Presiding Judge: Would you characterize the statements made by either of the actors in the film, Mr. Phillips, with respect to war, politics and taxes, as a discussion of a subject?

The Witness: Yes.

The Presiding Judge: All right, doesn't discussion imply an exchange of ideas, and views [171] between two people?

The Witness: Yes.

The Presiding Judge: Was there such an exchange?

The Witness: Yes.

The Presiding Judge: Or was there merely a statement that I won't vote or I won't go?

The Witness: I think it was a conversation in the sense that we generally have conversations.

The Presiding Judge: I do not think you have answered my question. There was no exchange of ideas between the people--

The Defendant's Counsel: (interjecting) Objected to, Your Honor.

The Witness: Yes, I believe there was.

The Presiding Judge: All right, what is the objection, Counselor?

The Defendant's Counsel: All right, the answer was given. Let the answer stand.

The Presiding Judge: I did not get the objection.

The Defendant's Counsel: I withdraw the [172] objection, Your Honor.

The Presiding Judge: Thank you. All right. Anything else of this witness?

The District Attorney: I have no further questions.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: All right, step down.

(Witness excused.)

The Defendant's Counsel: Mr. Heller.

Court Officer Joseph Hughes: Raise your right hand and face the Judge.

Judge Moldow: Do you solemnly swear the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Please be seated.

Court Officer Joseph Hughes: Give your name, address and occupation in a loud voice.

The Witness: My name is Saul Heller, I live at 252 East 61st Street in Manhattan.

[173] The Presiding Judge: Your occupation?

The Witness: My occupation is theatre manager.

SAUL HELLER, the defendant, residing at 252 East 61st Street, New York, New York, occupation theatre manager, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Mr. Heller, have you been a theatre manager at the Andy Warhol Garrick Theatre for a period of almost two years? A. Yes, I have.

Q. Were you the theatre manager since the Andy Warhol Garrick Theatre opened? A. Yes, I have been.

Q. Now, Mr. Heller, will you tell us your background prior to your becoming a theatre manager at the Andy Warhol Garrick Theatre? A. In the past seven, eight years, I have been with Consolidated Theatres of Connecticut, and the Fox Eastern Theatres who came into the east not too long ago, and for [174] a short period of time they brought me back to Manhattan. I was the manager of the Cue Theatre

Ticket Club. Since then I have been manager of the Garrick Theatre.

Q. Have you been a theatre manager during that period of time in various theatres, physically present at the theatre? A. In other--in all the theatres?

Q. Yes. A. In all the theatres, I have been physically present.

Q. Have you ever been connected, Mr. Heller, with any crime? A. I have not.

Q. Have you ever been arrested? A. No, I haven't.

Q. Now, you are the theatre manager at this theatre, is that correct? A. Yes.

Q. Are there any signs in the lobby of this theatre, when you enter the theatre with regard to anything? A. Well, when you enter the theatre, there is a very small lobby in the Garrick Theatre, and immediately [175] to your right, not more than five feet into the theatre, is the box office. It is a normal box office, with a window with a cut in the glass, and there are three signs about--my guess is seven by nine in size.

The Presiding Judge: Inches?
The Witness: Inches, yes, sir.

A. (continuing) One is a schedule, one is a price, and the third one has a big X, white lettering on a black background, and it says no one under 17 admitted.

Q. Are there any other signs in the lobby? A. There is another sign, other than the usual no smoking signs required by the Fire Department, there is a sign that is about 16 by 32 inches, and that is red lettering, a white background, and that is also required by the Fire Department, and says that the legal seating capacity is 299.

Q. The house is a 299 seat house? A. Yes, 299.

Q. Now, Mr. Heller, do you hire all the employees at the theatre? A. I didn't hear you.

[176] Q. Do you hire all of the employees at the theatre? A. Yes, I do.

Q. When you hire the employees, do you give them any instructions with regard to the operation of the theatre? A. The instructions, I take it you mean have to do with the selling of tickets and to whom we sell the tickets?

Q. What employees do you have? A. And we sell--

Q. What Mr. Heller? A. And the instructions are--

Q. (interjecting) Mr. Heller, what instructions do you have at the theatre? A. We have cashiers who are permanent, and we have others who are temporary. When I say temporary, I mean an usher, maybe a substitute cashier, when necessary. These people are instructed, that if anyone is obviously under 18 years of age, that we demand identification, and the kind of identification would be a driver's license, a draft card, something that would actually tell the age. The reason for the usher having that, is because if somebody should buy the tickets and then try to come in with [177] someone younger, they are stopped. This may be someone the cashier didn't see, and we will not allow, even if an adult says "well, he is with me, and he is my child," or something like that, we still do not allow anyone under 18.

Q. Now, Mr. Heller, what time do you go to work in the morning? A. I am there regardless of the opening of the picture, I am there at 10:30 in the morning, I leave around 2:30 or three in the afternoon, I come back between six and seven, and I am there until midnight.

Q. How many days a week do you do that? A. Seven days with the exception of the four days that I took not too long ago when I went to Florida to visit one of my daughters.

Q. Now, Mr. Heller, prior to the opening of this picture at the Andy Warhol Garrick Theatre, are you aware of the fact that this picture played at another theatre outside the State of New York? A. To my understanding, it played the Repertory Theatre in San Francisco without incident.

Q. Do you know that it played there seven days? [178] A. Yes, it did.

Q. Now, Mr. Heller, if this picture had been declared by any judicial tribunal in the State of New York to have been obscene, would you have played this picture at the Garrick Theatre?

The District Attorney: Objection.

The Presiding Judge: Well, we will allow it. Overruled.

The District Attorney: Well, the form of the question, Your Honor.

The Presiding Judge: We will allow it.

The Defendant's Counsel: Answer the question.

A. No, I wouldn't.

Q. If this picture had been declared by any judicial tribunal outside the State of New York to have been obscene, would you have played this picture at the theatre?

The District Attorney: Your Honor, I renew my objection. It is a hypothetical question, a leading question. This defendant is not an expert, I see no grounds for that question.

The Presiding Judge: Overruled.

[179] The Defendant's Counsel: Answer the question.

A. I would not.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: Any cross?

The District Attorney: Yes.

Cross Examination by the Defendant's Counsel:

Q. Mr. Heller, prior to being shown in Court, I presume you had seen this movie before, A Blue Movie, is that correct? A. Yes.

Q. You had an usher that checks people as they come in after they purchased a ticket from the cashier, is that correct? A. Yes.

Q. At every performance, is there an usher there? A. No, but I am there.

Q. So either you or your usher are there? A. Yes.

Q. Watching every person that goes into that theatre? A. Right.

[180] Q. How many different cashiers have you had in the past six months? A. In the past six months?

Q. Yes. A. I will have to give an approximation because they change.

Q. All right, how often do they change? A. Quite often.

Q. How many? A. Ten.

Q. You said they are instructed to allow no one in the theatre who is under 18, you said? A. Right.

Q. And the sign says under 17, is that correct? A. Seventeen happens to be the legal age to my understanding, that is the legal age in New York.

Q. That is what the sign says? A. That's right, the sign says 17, posters say 17, everybody uses 17. However, I did arbitrarily set 18.

The District Attorney: I see. I have no further questions.

The Presiding Judge: All right, step down.

[181] Judge Moldow: You may step down, sir.

(Witness excused.)

The Presiding Judge: Any other witnesses?

The Defendant's Counsel: None, Your Honor.

The Presiding Judge: That the defendant's case?

The Defendant's Counsel: That is the defendant's case, Your Honor.

The Presiding Judge: The People rest?

The District Attorney; The People rest.

The Presiding Judge: Both sides rest.

The Defendant's Counsel: Ready for motions, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: Give me about 10 seconds, Judge, to shuffle some papers. Ready, Your Honor.

The Presiding Judge: Yes, Counsel?

The Defendant's Counsel: Oh, I am ready, Your Honor. I am sorry.

The Presiding Judge: We are awaiting.

The Defendant's Counsel: All right.

[182] I know that this Court is keenly aware of thé changing social values, and that there has been a dramatic change in the social climate as has been exhibited in various and sundry mass media, and in particular, movies, and I call the attention of this Court to such movies that are currently playing, as Alice's Restaurant and Easy Rider.

I am also aware, after having read some of the opinions of this Court, and after having listened to all of the judges here, that they are keenly aware of the obscenity laws as they exist in both the federal and state courts.

However, each of us, whether it be judge or lawyer, must have, whether inborn or conditioned, certain prejudices, whether they be puritanical or libertarian, which must enter into their determination.

I would ask each of you, in making your determination in this case, not only exclude whatever your bias or prejudice may be, but also exclude, if possible, the fabric of motion [183] picture which must be also inextricably interwoven in your mind in making the determination and make it on the facts as exist in this particular case.

That background in mind, Your Honors, I would like to, I think as Mr. Al Smith said, before I was born, "Let's take a look at what transpired in this case."

The Presiding Judge: Is that what he said?

The Defendant's Counsel: No, "Let's look at the record."

The Presiding Judge: If he did, you have a very good memory, but go ahead.

The Defendant's Counsel: Not that good, Your Honor.

We had in this case, at best, from the People, a judge of this court view a film based upon a verbal communication from a district attorney and at the situs of the film, issue a search warrant and several John Doe arrest warrants.

[184] That judge upon cross-examination, was not permitted to go into the criteria for making his determination.

We then had a deputy inspector testify that he had viewed this motion picture two days beforehand with several other witnesses, the district attorney had originally communicated with the judge, and he accompanied the Judge to the viewing of this motion picture, and then the judge issued these papers, to wit, the search warrant and the arrest warrant, and that he thereafter signed a formal complaint in this case.

We then viewed the motion picture.

There was not a scintilla of evidence introduced to controvert any of the standards set forth in Roth, in Redrup or in Stanley.

Motions made at the end of the People's case by myself were then denied.

The defendant then put on the stand, and I must say this, as Mr. Mike Nichols has said many times, people see in motion pictures what [185] they want to see in them. Nobody is an expert.

We then put on the stand a recognized expert, by the name of Parker Tyler, whose book has been submitted into evidence, and this Court's recollection of Mr. Tyler's testimony, and the reading of the paragraph in his book which came out prior to any seizure in this particular case, or I may have talked to him is the best recollection of Mr. Tyler.

We then had on the stand, Dr. Charles Winick, who ad nauseam went into his qualifications in his field, and testified to the redeeming social value. At one point, I think Judge Moldow asked him how old he was, and he said 47, and maybe he didn't speak for the younger people but he certainly had an opinion as to the redeeming social value, and he is an accredited sociologist, and an accredited movie expert.

We then had a young man of the age of 27 who was also a film critic, testify here this morning, and that gentleman's testimony is best [186] known to each of Your Honors.

Finally, we had the defendant testify in this case that he has no prior criminal record, he was not aware of any obscenity, had he been aware of obscenity he certainly would not have played the picture, and at the same time he testified to the effective modus operandi that he employs in running the theatre.

That is the whole case. There has been no rebuttal witnesses, there have been no witnesses from the People in rebuttal to shatter any of the views of any of these people. Whether they are right or wrong, they have a right to make these views, they are accredited people.

Now, Your Honor, at this point, I would like to get to the law.

I think that the first point I would like to make, because I had almost forgotten it, is that we are in a criminal trial, and knowledge is an essential ingredient inorder to find this defendant guilty.

Further, the burden of proof is upon the [187] People on each and every element of the crime. It may be, as has not been demonstrated here today, that this defendant had to even come forward to refute the burden of proof. The People have proved absolutely nothing in this case.

Now, I would like to get to the pertinent law as I understand it in this type of obscenity trial. I think that there are two specific points, to wit, the procedural aspects of due process in an obscenity trial.

Yesterday it was my contention, and it is my contention today, that four federal circuits have held that there must be an adversary determination, a prior adversary determination in an obscenity case, and for the record I am going to cite Metzger versus Pearcy, 393 Federal 2nd 202 7th Circuit; Cabist Films, Inc. versus Illinois, 292 Federal Supplement, Northern Illinois; Natali versus--

Judge Moldow: Give the page on that one.

The Defendant's Counsel: I only have the [188] index number, 111, 1968. I am going to hand up to the Court, by the way, Judge McLean's opinion in a moment.

The Presiding Judge: You mean in the--

The Defendant's Counsel: Right, I am going to get--

The Presiding Judge: (continuing)--in the 208 case?

The Defendant's Counsel: Yes, in the 208 case, right, and we have the case of Natali versus The Municipal Court of the City and County of San Francisco, decided by U.S. Judge Zirpoli, index number 50737 1969.

However, as Judge Ringel pointed out yesterday, Judge McLean in a decision in the United States District Court, in the case of 208 Cinema, Inc. versus Vergari, 69 Civil 1747, on page 14 says, and I quote from his opinion,

"This conclusion," and he is speaking about the conclusion he reaches, "is contrary to that reached by the Seventh Circuit in Metzger and in a district court decision in that circuit, [189] Cambist Films, Inc. versus Illinois. In my opinion those decisions placed undue emphasis upon the language rather than the actual holding of a Quantity of Books. Those decisions are not binding upon me and I decline to follow them."

I hold contrary to Judge McLean. However, as I stated yesterday, right in the heart of Judge McLean's opinion, on pages 12 and 13, we find the following language, "Instead of the unsupported conclusory affidavit of a police officer, we have,one, detailed factual affidavits of an assistant district attorney, two, personal observation by a judge of the very films that were seized."

If this Court wants to only hang its coat on two, that is its prerogative. I say they do not have a right to do that.

And then, I will hand up for the benefit of the Court, the opinion, and I am sorry it is not a good Xerox of Judge McLean's opinion.

The Presiding Judge: All right.

The Defendant's Counsel: Now, Judge [190] McLean's opinion was fulcrumed upon upon substantial supporting affidavits.

Deputy Inspector Smyth could have had substantial supporting affidavits between July 29th, and July 31st. He didn't.

Judge Moldow: What would that have added to Judge Goldberg's observation of the film itself?

The Defendant's Counsel: It would have mattered, there would have to be probable cause for him to go there.

Judge Moldow: You mean he did not have the right to go there in the course of his official duties without having what you consider to be probable cause to even do it?

The Defendant's Counsel: That's right. If I asked Your Honor to go there, would Your Honor go to see a film and make a decision? I am as much a judicial officer as an assistant district attorney.

The Presiding Judge: Well, theoretically.

The Defendant's Counsel: All right. Now, [191] if you want to take the viewpoint, and I myself go one step further, between the 29th and the 31st there were no affidavits, Smyth was here in the courtroom yesterday, he is probably here in the courtroom this morning, nowhere has the District Attorney put into evidence any affidavit, it is an ethereal paper which did not exist as far as I am concerned, and as far as the Court is concerned.

The Presiding Judge: Counsel, I pointed out yesterday, if you want to attack the warrants in this case, and you are doing it by innuendo, at least--

The Defendant's Counsel: (interjecting) No, Judge, I am going to the weight of the evidence.

The Presiding Judge: Who is interrupting whom?

The Defendant's Counsel: I am sorry, Your Honor.

The Presiding Judge: Your remedy, Counselor, would have been a motion to controvert [192] the warrant, and you never made such a motion.

The Defendant's Counsel: Yes.

The Presiding Judge: All right.

The Defendant's Counsel: I say that Judge Goldberg, in this matter, flies in the face of constitutional protections, and on a diminutio basis, assuming Judge McLean is correct, they haven't even followed that procedure here.

Now, as Judge Ringel aptly pointed out yesterday, Article 22 in his opinion--

The Presiding Judge: Article 22a, small a.

The Defendant's Counsel: Yes. In his opinion, and in mine, does not control theatre and film. I think it is incumbent, in order to make the statute constitutional, under which this defendant is being tried, that there be built into that statute an effective procedural modus operandi so that a defendant in a criminal case, such as this, which I admit is unusual, would have the requisite knowledge of scienter that are required to find him guilty in any criminal proceeding. It is [193] impossible for this defendant to have known that that picture was obscene by any stretch of the imagination.

Now, with regard to the verbal communications of the District Attorney, and the Judge in this matter, I find no--

The Presiding Judge: You mean Judge Goldberg?

The Defendant's Counsel: Judge Goldberg.

The Presiding Judge: Yes.

The Defendant's Counsel: There is no doubt that there is no harm in means of judicially communicating with lawyers. Howevery, in this particular type of case, socializing may be fine on an innocuous matter, but when it comes to a medium for an ex parte addressed to the Court on a highly sensitive and important aspect of a pending case, and this is a pending case no matter how it may be construed, without the knowledge or consent of the adversary, then it is so gross in error, that irrespective of other circumstances, it would require reversal.

[194] A defendant whose liberty and future are at stake is guaranteed the right to be present at all important stages of a trial, and I am only going to cite the Criminal Code, Section 356.

"Any sort of ex parte procedure which denies this right, violates the defendant's guarantee of a fair trial as well as the statute, the People ex rel Lupo v. Fay 13 New York 2nd 253 People v. Oliver 4 Appellate Division 2nd 28 affirmed New York 3 2nd N.Y. and People versus Insogna 28 Appellate Division 2nd 771, 3rd Dept., also Canons of Professional Ethics 3 and 5."

Now, at this point, I would like to digress as to the substantive aspect of the case. I think that we have the Roth doctrine which was amplified on Redrup versus New York, which sets forth the standard under which the film such as this may be deemed obscene, and as I recognize it, you must have the dominant theme of the material taken as a whole, must appeal to prurient interests in sex and the film must be patently offensive because it affronts contemporary community standards in its [195] representation and description of sexual matters, and the film is utterly without redeeming social value.

And that decision by the latest pronouncement of the United States Supreme Court in which Mr. Justice Marshal wrote--one second--

The Presiding Judge: Stanley versus--

The Defendant's Counsel: I know it is Stanley versus--

The Presiding Judge: Oh.

The Defendant's Counsel: In the case of Stanley versus Georgia, we find the following, the Supreme Court condemns the Georgia statute there as amounting to "the assertion that the State has the right to control the moral content of a person's thoughts."

The Court went on to explain, and I am now quoting from Stanley versus Georgia.

"To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in Kingsly International Books Corp. v. Regents, 360 U.S. 648, 688-689... 'this argument misconceives what it is that the Constitution protects. Its guarantee is [196] not confined to the expression of ideas that are conventional or shared by a majority... and in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.'"

The Court then continued to rule:

"Nor is it relevant that obscenity in general, or the particular films before the Court are arguably devoid of any ideological contents. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See Winters v. New York, supra, 333 U.S. at 510..."

Finally in Stanley v. Georgia, supra, the Supreme Court explained,

"Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thought, and the right to possession such material presupposes the right to acquire it as well."

Now, if that be the most recent pronouncement [197] of the United States Supreme Court, and if we take the facts as adduced here before this Court, let us see what the facts were with regard to that.

We have established that the film was not available for children under the age of 17.

Mr. Heller has testified that they had to be 18 to get in. There has been no evidence contrary to that in this entire case.

We have no demonstrable harm being performed here in that we are not foistering this film upon the people here or anyone else to have to pay to get in, we are not showing film on 42nd Street in the open public.

We have no widespread distribution of the material here as was set forth in the famous Roth case, Ginsburg case in pandering. We have no intrusion upon the rights and sensibilities of private general public as in Ginsburg. We have no unconventional sexual activity in this film, and with due respect to Judge Moldow, I have not yet seen one film on 42nd Street where there is [198] unconventional sexual activity such as masochism, sado-masochism, lesbianism or whatever you wanted to have found obscene in this courtroom.

We have no evidence adduced by the People controverting any of the defendant's statements, and we do have the testimony from three defenses, from three witnesses, one 27 years of age, and not 47 as was Mr. Winick, he found it to be of social value, and we don't have to conduct a seminar; he found it, Judge Winick, excuse me, Dr. Winick, found it, I am sorry, and in addition, Parker Tyler found it. Now these three men were not contradicted by anyone.

Now, in the last argument, Your Honor, this is supposed to be a crime. McLean's decision, Your Honor, was in a civil case. I am Curious Yellow was in a civil case. U.S. versus 1 Carton, which I tried in the Federal Court was a civil case.

And all three cases, we were not dealing with scienter. We have no possibility of this defendant, nor have the People introduced anything [199] knowing that he committed a crime. The picture played openly, notoriously to the general public seven days in San Francisco, and there was never any adverse determination, to the best of my knowledge, with regard to this picture in any jurisdiction in the United States.

Now, Your Honors, in closing, I would like to call the attention of this Court to what I believe Your Honor alluded to yesterday, and that is in its anaylsis of the work of the Warren Court, the New York Times Magazine of September 7, 1969, page 99, in an article written by Professor Bishop of Yale concludes, "I don't think obscenity remains undefined, the upshot is that nine generally sedate lawyers have spent an inordinate amount of time reading books, and watching movies, that would bring a blush to the cheek of an editor of Grove Press."

It is respectfully submitted, Your Honors, and this may be my view, I know we are in a criminal court, that whatever obscenity is, it is [200] immeasurable as a crime, and delineable only as a sin, and as a sin, it is present only in the minds of some and not in the minds of others. It is entirely too subjective for legal sanction.

The District Attorney: Your Honors, I think the question of the procedural aspect of the search warrant was decided yesterday. I will repeat, however, again, the procedure followed in this case was the same procedure we have followed in every obscenity case, that is, an affidavit was presented to an officer of the court who viewed the obscene material or the material in question. In this case, there was verbal communication between the District Attorney and the Judge, because arrangements had to be made, it wasn't a question of going in to a judge in his chambers and presenting him with newspapers and an affidavit. The judge had to consent to his time schedule, to leave the court and go down and actually see the subject of the pending prosecution.

The procedure we used was absolutely no [201] different from any other procedure we use.

The question of adversary determination has been decided in the Rage Book vs Commissioner of Police of the City of New York, and the question has been decided that non-adversary determination in obscenity proceedings is well within the law, and the defendant is not being deprived of his rights.

I might also point out that if the question being determined at this non-adversary determination or ex parte proceeding is obscenity, it is that very question that this Court is deciding on in this trial. This defendant has not been deprived of any of his rights.

Secondly, the defense counsel alludes to defendant's lack of knowledge of the crime, but I think that is totally dismissible as far as argument. To my mind, there is a presumption in the New York State Penal Law that says anyone that ~~promoter,~~ sells or produces obscene material is presumed to have knowledge of its content.

Now, we have had testimony from this defendant [202] that he has been in the movie business for a long time, he is managing a theatre. Besides this presumption, we can also rest assured that I think this defendant knew that he wasn't showing Mary Poppins up there in that theatre, and this movie was something different. I don't think the Court has to stretch its imagination to presume that this defendant did have knowledge of the obscene material of this production.

Thirdly, of the defense's contention that the People did not provide any witnesses, contrary to the testimony, the ex parte testimony presented by the defense, I think the cases here again well hold that the People did not have to produce witnesses testifying to the socially redeeming value, or whether this movie is or is not appealing to the prurient interest, or whether it is offensive to the community's moral standards.

In this case, the prime piece of evidence that has been presented by the People of the State of New York is the movie itself. The Court [203] has seen this movie. Counsel in his closing argument elludes to the fact that nine justices had to sit and look at books that would cause an editor of Grove Publications to blush. However, it is a fact that the People who can decide this issue of obscenity are the judges themselves. They are as much a part of the community as anyone else. If I were to put five witnesses up there, saying that this movie has no redeeming social value, that it appeals to the prurient interest, that it is offensive to the community's social patterns or standards, it wouldn't make any difference because the biggest piece of evidence in this case for the People is the movie itself, and the judges have all seen this movie.

I think as far as the expert testimony, I don't think this is an I Am Curious Yellow type of situation in this movie. In I Am Curious Yellow we had 13 people testify to the redeeming value, the theme of the movie, what the talk was about. Some of them were alike, some different. [204] Here we had three expert witnesses, one of whom, Mr. Tyler, states that the dialogue means nothing. In his words, it is the cool world's approach to sex, or the cool world's approach to the problems, but the dialogue means nothing. He stated, in cross-examination, that if they talked about subjects completely different, it wouldn't have made any difference.

The second witness, Dr. Winick, also admits that for the most part the dialogue means nothing. He saw the redeeming value in the acts themselves, the realistic portrayal of the sexual act, that was the redeeming value that he saw. There was no redeeming value outside of these acts or a plot line or story or even a theme. The redeeming value was the act, the real act of intercourse, that is what he saw as its redeeming value.

The third witness, of course, makes a complete turnabout, and to him the dialogue is very important. Even though he admitted in many cases he didn't even hear the dialogue, he also admitted upon cross-examination that the dialogue only [205] took up less than about a third of the movie, the dialogue had related to political and social discussion and theory.

I think we have a conflict here as to what the theme is of this movie. The defense's own expert witnesses are very confused as to what the social redeeming value is.

I think, finally, defense counsel's reference to Stanley versus Georgia, and reading from that opinion, expresses a situation that is so far different from the case before us, that I don't even think it is worth alluding to. However, just so there be no mistake, that Stanley versus Georgia applies to obscene films found in a person's home, there is no question that this movie theatre is a public place. People paid to go in but it is still a public place, it is a public theatre that is licensed by the City. It is not a private home. I think the defense, counsel's contention that people underage were not allowed into the theatre, to me has no impact, has absolutely nothing to do with the issue here [206] today. The crime we are discussing, is not a sale to a minor of obscene material, the crime that we are talking about is 235.05 of the Penal Law which has nothing to do with age.

I think, in conclusion, the People have more than sustained their burden of proving a case of obscenity by the mere showing of this film to the Court.

The Defendant's Counsel: May I just add one sentence, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: If it is possible.

First, as I understand this type of case, if there is an iota of redeeming social value, in the decisions, and that iota stands, that is sufficient to overcome anything that has been proposed by the People.

Number two, I am not sure, and I don't know whether the Courts are sure whether the People must prove this case beyond a reasonable doubt, or in this type of situation to a moral [207] certainty, and I would just add those two points.

The Presiding Judge: Well, this being a criminal prosecution, I think the law is clear that the People must establish the guilt of the defendant beyond a reasonable doubt. Is there any question about that?

Judge Moldow: No question.

The Presiding Judge: This is not a civil proceeding. With respect to the scienter, on the part of the defendant, how would you interpret the defendant's instructions for his staff, "Don't let anybody in under 18," wouldn't that be indicative of some knowledge on his part of the nature of the film?

The Defendant's Counsel: Absolutely not, Your Honor.

The Presiding Judge: Absolutely not?

The Defendant's Counsel: Absolutely not, because in practically every theatre in the City of New York where you have an X sign or restricted sign, the same things prevail, where the theatre managers tell their ushers and cashiers that they [208] cannot let people into the theatre under the age of 17, and I don't think those Columbia Pictures people are being prosecuted here or anyone, it just happened we had four pictures at that theatre, all Andy Warhol pictures--

Judge Moldow: I don't think that is appropriate argument. That question just occurred to me and I might also call your attention to the opinion of Mr. Justice Frankfurter in Smith versus California in which he said the defendant cannot insulate himself from obvious matters of knowledge.

The Defendant's Counsel: He was doing better than that, he was self-regulating the theatre in conformity with the laws of the State of New York.

The Presiding Judge: Who?

The Defendant's Counsel: This theatre. The laws of the State of New York say you should not let a person under the age of 17 come into the theatre, yet he was making certain of that. There is a restriction, an X rating under the code.

[209] The Presiding Judge: You mean I can't take my grandchild to a movie in New York?

The Defendant's Counsel: There are certain ratings, Your Honor, which one--

The Presiding Judge: Certain ratings. Wouldn't that factor that he put an X rating up or saw the X rating, wouldn't that put him on some notice to look out?

The Defendant's Counsel: There are over 400 pictures with X ratings, Your Honor.

The Presiding Judge: Well, all right. All right, we will consider your motion.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: I just want to say one thing. This is not a prosecution for obscenity distributed to a minor.

The Defendant's Counsel: Absolutely not.

The Presiding Judge: All right, you were arguing that as another section of the Code of the Penal Law.

The Defendant's Counsel: Understood, [210] Your Honor.

The Presiding Judge: All right.

(Whereupon the Court conferred in their Chambers.)

(Court returns from Chambers.)

The Presiding Judge: We have listened with great interest to the testimony, and the very able argument by counsel on both sides.

It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.

We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.

With respect to the absence of adversary proceeding as provided in the Code of Criminal Procedure, Section 22a, I think we are in agreement, Counsel has indicated there is no [211] provision for an adversary proceeding under that section with respect to motion picture films.

We find that the motion picture in question is hard core pornography, see People versus Richmond County News New York 9 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104, under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work and material in question has redeeming social value. That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. [212] The expert testimony in this case presented by the defendant is not persuasive.

All right, what date for sentence, Counselor?

The Defendant's Counsel: The Court is ready, Your Honor, tomorrow morning?

The Presiding Judge: Well, we need the fingerprint record.

The Defendant's Counsel: I think he has been fingerprinted, Your Honor. Do we have a print on him? If there is no objection, we have no objection to proceeding to sentence.

The District Attorney: There is no objection.

The Presiding Judge: No prior record?

The District Attorney: He has no prior record.

The Presiding Judge: All right. He has no prior record. You are waiving the two days' notice?

The Defendant's Counsel: Absolutely, Your Honor.

The Presiding Judge: Is there any--

[213] Judge Moldow: May your client stand, please?

The Defendant's Counsel: Yes, I am sorry.

The Presiding Judge: If you are ready for sentence, there is no legal cause why sentence should not be now imposed by the Court, the Court will be ready to hear what you or your client or both have to say in mitigation of sentence.

The Defendant's Counsel: Well, there is no reasonable cause why sentence should not be imposed, and with regard to that, what I or my client have to say with regard to sentence, the Court has heard for two days, all of the testimony in this matter, and I don't think that there is anything that I could say or my client could say that would aid or abet the Court, save the fact that this man for 66 years has never been arrested for anything in his life.

The Presiding Judge: What is his connection with the theatre? Does he have any [214] connection other than as a manager?

The Defendant's Counsel: No.

The Presiding Judge: Does he own any stock?

The Defendant's Counsel: He does not own any stock.

The Presiding Judge: Does he have anything to do--

The Defendant's Counsel: He is an employee.

The Presiding Judge: What is his salary?

The Defendant's Counsel: It is $175 a week.

The Presiding Judge: All right.

Judge Moldow: Does your client wish to say anything in his own behalf?

The Defendant's Counsel: Mr. Heller, would you like to say something?

The Defendant: I am too much in shock to say anything, with the pictures that I have seen and the ways they are presented here and under the circumstances, people in the amusement industry and [215] the members of the public all find their own level as far as amusement is concerned. I doubt that anybody who purchased a ticket for this picture was harmed in any way, shape or manner by viewing this picture. I saw other pictures, that this was a kiddy matinee to what is playing in some of the other theatres.

I am too shocked, I am not going to ask Your Honor for any clemency at all, I have a little too much pride for that.

(Court confers at Bench.)

The Presiding Judge: The Court is taking into consideration the defendant's age, his prior good record, and the fact that he is no more apparently than an employee of a theatre which shows pictures in which he happens to be the manager.

Had a more closer connection been indicated, and do you have any information on that, anything else on that, on the closer connection other than the fact that he is a mere employee?

The District Attorney: No, Your Honor.

[216] The Presiding Judge: Had a closer connection been indicated, the Court would have taken a very severe view of the defendant's actions in this case.

Under the circumstances, the fine is $250 or 30 days.

The Defendant's Counsel: Your Honor, give me until some time—

The Presiding Judge: One week enough?

The Defendant's Counsel: One week is fine, Your Honor.

The Presiding Judge: All right.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: You are welcome. Step over on the side, please. September 24th to pay.

(Whereupon another case was called and disposed of).

(Later)

The Defendant's Counsel: The defendant will pay the fine of $250 and I ask that the film [217] be held by the Police Department in the same condition as it is in now pending an appeal. I do not want the film confiscated.

The Presiding Judge: I have no control over what the Police Department will do or what the process here is. What is your standard operating procedure?

The District Attorney: Your Honor, the film is retained by the Property Clerk. I believe if there is an appeal being taken the film will not be touched. It will be held in the Property Clerk's office.

The Presiding Judge: You have 30 days to file an appeal.

The Defendant's Counsel: It will be made within a week.

The Presiding Judge: All right, we will hold the exhibit in the court, in the custody of the court. Now, is there any objection, counselor, if the District Attorney takes the film and keeps it in their--

The Defendant's Counsel: Absolutely not.

[218] The Presiding Judge: In their room and gives you a receipt for it?

The Defendant's Counsel: Absolutely not.

The Presiding Judge: All right, thank you.

Judge Moldow: And also a book involved.

The Presiding Judge: All right.

Court Officer Joseph Hughes: He has the book.

The Presiding Judge: We read that chapter.

The Defendant's Counsel: I read it myself.

The Presiding Judge: All right, you did a good job, Counselor. Sorry we don't agree with you.

Certified to be a true and correct transcript of minutes taken in the above proceedings.

s/ Jerome Oppenheimer, CSR
JEROME OPPENHEIMER, CSR
Official Court Reporter

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 2B3

- -

PEOPLE OF THE STATE OF NEW YORK,

Complainant,

-against-

SOL HELLER,

Defendant.

- -

DOCKET NO. B19858

100 Centre Street,
New York, N.Y. 10013
October 27, 1969

BEFORE:

HON. WILLIAM E. RINGEL, Justice,
HON. MORTON TOLLERIS, Justice,
HON. BERNARD MOLDOW, Justice.

APPEARANCES:

FRANK S. HOGAN, District Attorney,
For the People,
155 Leonard Street,
New York, N.Y. 10013

BY: RICHARD BECKLER, A.D.A.

JOEL H. WEINBERG, ESQ.,
For the Defendant,
1465 Broadway,
New York, N.Y.

COURT REPORTER: George Aaronson
COURT OFFICER: Joseph Hughes

[2] PROCEEDINGS

Justice Ringel: This is the case of People versus Sol Heller, et al, Information Number B19858, 1969, Joel H. Weinberg, Attorney for defendant has made a motion.

Mr. Beckler from the D.A.'s office is here representing the People.

We will hear what you have to say, counselor.

Mr. Weinberg: If it please the Court, on September 16th and 17th of this year, before this Court, the case of People versus Heller was tried, and on September 17th this reading from the court record Judge Ringel, at Page 210, stated as follows:

"We have listened with great interest to the testimony and the very able argument by counsel on both sides. It is the conclusion of the court that the motion to dismiss is denied, that the defendant is found guilty."

We would like to call to your attention that with respect to the due process clause violation urged by counsel there was a judicial scrutiny by [3] a judge of this court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the U.S. Supreme Court.

On that very day prior to the judges' unanimous opinion, at Page 201 the District Attorney in summing up stated: "The question of adversary determinations has been decided in the Rage Book vs. Commissioner of Police of the City of New York, and the question has been decided that non-adversary determination in obscenity proceedings is well within the law and that the defendant is not being deprived of his rights."

On December 16, 19 -- on December 17th, at Page 187, in my motion to dismiss at the end of the entire case --

Justice Moldow: That's September 17th.

Justice Ringel: September, you mean.

Mr. Weinberg: I'm sorry, your Honor.

Justice Ringel: That's my birthday.

Mr. Weinberg: It was September 17th.

Justice Moldow: Yes.

Mr. Weinberg: My motion to dismiss at Page 187, I stated to the Court, "Yesterday it was [4] my contention and it is my contention today that four Federal Circuits have held that there must be an adversary determination in an obscenity case, and, for the record, I am going to cite "Metzger, et cetera", and cited four cases. I went on for two pages with regard to that.

On September 16th, the day before, I went into the same matter and covered the same grounds.

Now, the reason that I am here today is that it was always this defendant's contention that prior to the film in question being seized by law enforcement officers there had to be a prior adversary proceeding declaring the film obscene in order to be constitutionally valid.

On October 6, 1969, in the case of Bethview Amusement Corporation versus Kahn, a Xerox copy of the entire opinions of Justices Waterman, Hayes and I think, Bartels, was submitted to each of your Honors prior to coming here this morning--

Justice Ringel: Yes, we read it.

Mr. Weinberg: And on October 8th, two days later, the very case upon which, I believe, Judges Moldow and Ringel, relied, to wit, 208 Cinema [5] versus Steinberg was overruled in the Second Circuit by three judges, to wit, Judges Moore, Kaufman and Waterman in open court.

Justice Ringel: Are you referring to the decision you handed us?

Justice Moldow: No, it wasn't in existence at that point when we tried the case.

Mr. Weinberg: That is correct.

Justice Ringel: Do you have a copy of the minutes of that?

Mr. Weinberg: I have a copy of the Clerk's minutes on that. I do not have a copy of--

Justice Ringel: It would be helpful to have it.

Mr. Weinberg: I will give your Honor, I have here--

Justice Ringel: You don't have to give it to us right now. Go on with your argument.

Mr. Weinberg: I do have the document which I affixed to the motion paper, a Xerox copy, of the docket, and if the Court so --

Justice Ringel: Yes, I have it here.

[6] Mr. Weinberg: If the Court so desires, I have one original of the Bethview case.

Now, it is true, your Honor --

Justice Ringel: Excuse me for interrupting. There was not any memorandum of law or anything that the Court handed down on that other than what you have given us here?

Mr. Weinberg: As far as I know, your Honor?

Justice Ringel: Yes.

Mr. Weinberg: May I say this: I was tangentially involved in that case having represented one of the defendants as we went through in the trial of the matter and submitted a protracted memorandum of law, and at the time that we tried this case on September 16th and 17th there is no doubt that Judge McLean had made a determination which this Court had every right to rely on if it so desired. I argued contrary to that determination.

No, as of this date, Judge McLean has been overruled in open court, and the reason we are here today is that I believe we are discussing [7] fundamental constitutional rights and not obscene or dirty film, we are discussing court procedures and police procedures and not an obscene or dirty film and we are talking about a criminal prosecution and a defendant's liberty.

Justice Moldow: Counselor, I don't want to interrupt your argument, but I have a threshhold question that I'd love to hear your view on.

This case has been concluded and the fine has been paid, final judgment in this case. What authority do we have to set aside our own judgment even if the law changed subsequently?

Mr. Weinberg: You have three points of authority, in my opinion. I say this factually. You have it in the nature of an arrest of judgment which may be argued that I cannot argue it here today, you have it in the inherent right of this Court to decide something on the basis of something justice and you have it in the nature of a quasi form of Corum Nobis proceeding. To be frank with you, I can't hang my hat on any [8] one of these, but you do have something that is very, very important here, and that is this, particularly Judge Moldow -- and I'm referring to you directly when I say this: I think the gravamen of your determination was predicated upon the fact -- and I think I had colloquy with the judge -- to the effect that you had a right to find something obscene by yourself, and I said you didn't.

Now, there can be no clearer ruling than the Second Circuit.

Justice Moldow: Are we still talking about the jurisdictional threshhold?

Mr. Weinberg: Well, the jurisdictional threshhold, your Honor, I have no authority except to state what I said here. I think that rather than -- and I say this in all sincerity as I said it that day -- I didn't buy the record solely for the purpose of looking at it, I'm about to take this up on appeal, but I think there's no necessity for an appeal in that the law is crystal clear throughout the United States at this point, no longer is McLean controlling in any area. [9] McLean has been overruled. The Second Circuit, five judges have said what you need in this type of case, and if I may just --

Justice Moldow: But if we changed our judgment, assuming jurisdiction relying on the case that you're talking about, that would put you and your client in a better position than the case you are relying on, wouldn't it?

Mr. Weinberg: Absolutely, but that's the position you put me in, I didn't put myself in that position in this and I thought about that also, but I'm not the one who created that position. That position was created by a determination of a three-man bench of which your Honor, all three --

Justice Ringel: Relying on what the law was at the time we made the decision, at least.

Mr. Weinberg: Agreed, to this extent. It was not the law at the time you made the decision, it was on a lower court's law at the time you made a decision. Every circuit court in the United States had a ruling contrary to the ruling --

Justice Ringel: Every circuit court?

Mr. Weinberg: To the best of my knowledge.

[10] Justice Ringel: I only know of the Seventh Circuit, that's the Metzger case which was in Indiana -- I don't know what circuit that was in -- and you had one down in the Fourth Circuit in the Tyrone Wilkinson case.

Mr. Weinberg: Be that as it may, it's my contention at this time whether or not there is a threshhold answer to the question proposed by Judge Moldow, I maintain in the interests of substantial justice in a criminal prosecution where beyond cavil all of the courts in all of the circuits as of this date have held that you must have a prior adversary determination of obscenity in order to declare a film obscene and the very language of the United States Court of Appeals in Bethview Amusement Corp. versus Kahn on Page 3555 to wit, "The only issues raised is whether the protection required by the First Amendment required that appellees be given an opportunity to be heard on the issue of obscenity before the film could be seized by the police.

"We hold that the First Amendment as applied to the states by the 14th requires and adversary [11] hearing in such a case."

I maintain as of this date, in the interests of substantial justice, that this court reverse its judgment of conviction on the law as it now exists, acquit the defendant and remit the fine.

Mr. Beckler: Your Honor, the People have only two main points to wager on this argument for reversal of conviction by this bench. The first is that motions to suppress the evidence in this case were waived by this defense counsel. We brought this case immediately to trial. Were this court to reverse the conviction and People would therefore have no remedy in that we would get into a problem of double jeopardy, there is no motion that could be decided from which the People could appeal, there is only a reversal of conviction on trial which would leave us no ground to appeal. It is on that ground that the People would oppose this motion for reversal of conviction.

The second course we would ask this Court to follow is not follow the decision of the Second Circuit Court in that this law is still in a state of confusion. The cases which have been enumerated [12] by defense counsel, Metzger for one, Metzger is a case in which four different rulings were made as to the non-obscenity of this movie when a court in Indiana or a police prosecutor in Indiana decided to go ahead and prosecute this movie and seized it. This is a far different circumstance than the case before us today, the Heller case. This case is still in a state of confusion and this Court should not follow the Second Circuit opinion.

On that ground and also that the motion to suppress was waived in the beginning before trial started on this matter, the People feel that this conviction should not be reversed.

Justice Ringel: We will reserve decision on the motion, Mr. Weinberg, and we will have to adjourn it for a week or two anyhow.

Let us say two weeks, gentlemen.

Mr. Weinberg: May I ask this question: Must I again appear, your Honor, on this?

Justice Ringel: Not unless you desire.

Mr. Weinberg: I didn't mean it facetiously. I don't know what you mean by adjournment.

[13] Justice Ringel: We're going to reserve decision on your motion, make a decision within two weeks.

Mr. Weinberg: Fine, no problem.

Thank you, your Honor.

Justice Ringel: Two weeks from today is?

The Bridgeman: November 10th.

(Presiding Justice Ringel, also Justices Moldow and Tolleris)

I hereby certify that the above is a true and correct transcript of the proceedings in the above-entitled matter.

s/ George Aaronson
George Aaronson

Court Reporter

Decision

CRIMINAL COURT OF THE CITY OF NEW YORK
PART2B-3 : COUNTY OF NEW YORK

- -

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SAUL HELLER, SUSAN EPSTEIN and
MARK KERN,

Defendants.

- -

Dockets: B—19858
B—19859
B—19860

Charge: 235.05

Criminal Courts Building
100 Centre Street
New York, New York
November 10, 1969

BEFORE:

HONORABLE WILLIAM E. RINGEL,
Presiding Judge.

HONORABLE MORTON TOLLERIS,

HONORABLE BERNARD MOLDOW

APPEARANCES:

FRANK S. HOGAN, ESQ.
Atty for the People
155 Leonard Street
New York, New York
BY: JERRY HINCKLEY, ESQ. of Counsel

JOEL F. WEINBERG, ESQ.
Atty for the Defendants
1465 Broadway
New York, New York

ANTHONY TRIMBOLI, Court Officer.	IRA DICKSTEIN, Court Reporter.

[2] Court Officer: Dockets B-19858 through 60 Saul Heller, Susan Epstein and Mark Kern, charged with 235.05 of the Penal Law.

Judge Ringel: Yes, Mr. Weinberg.

Mr. Weinberg: Ready for the decision.

Judge Ringel: We have read your motion papers and given the matter a great deal of thought and consideration. This Court feels it is without power to grant the motion. The remedy, if any, lies within an appellate court. The motion is therefore is denied.

Mr. Weinberg: Thank you, your Honor.

Certified to be a true
and accurate transcript.

s/ Ira Dickstein,
Ira Dickstein,
Court Reporter.

Stipulation Dispensing With Reproducing of Exhibits and Minutes of Adjournment

SUPEME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT

- -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SAUL HELLER

Defendant-Appellant.

- -

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the Defendant-Appellant and the attorney for the Respondent, that the appeal in the above entitled action shall be limited to the proceedings had on trial and at sentence.

IT IS FURTHER STIPULATED AND AGREED that the arraignment and adjournment minutes need not be reproduced since no error is assigned thereto by Defendant-Appellant except that if the District Attorney determines these minutes are necessary for consideration by the Court, then the same shall be furnished and may become part of the record on this appeal.

IT IS FURTHER STIPULATED AND AGREED that exhibits, if any, need not be made part of the record, that originals will be submitted to the Court at or before the call of the Calendar.

Dated: New York, New York
January 9, 1970.

s/ Irving Anolik
Attorney for Defendant-Appellant

s/ Frank S. Hogan by Lewis R. Friedman
Attorney for Respondent

Order of Appellate Term Appealed From With Dissenting Memorandum

Appellate Term - First Department
Dated - July 15, 1971

97 PEOPLE, & CO., res. v. SAUL HELLER, def-ap -

Judgment of conviction affirmed. No opinion.

Streit, J.P. and Quinn, J. concur.

Markowitz, J. dissents in the following dissenting memorandum.

Whether the film before us is obscene is a question of constitutional judgment — a mixed question of fact and constitutional law — calling upon the court to make an appraisal of the film and its contents against the requirements embodied in both the State and Federal constitutions (People v. Richmond County News, 9 N.Y. 2d 578, 581).

Sex and obscenity are not synonymous (Roth v. United States, 364 U.S. 476, 487). The problem of drawing "the dim and uncertain line" between proscribed obscenity and constitutionally protected expression is indeed thorny — and I recognize that this film may possibly be found to be utterly without redeeming social value. However, under the guidelines established by the United States Supreme Court and our Court of Appeals (Memoirs v. Massachusetts, 383 U.S. 413. Roth v. United States, supra, 354 U.S. 476; People v. Solomon, 26 N.Y. 2d 631, aff'g determination of this court, September, 1967, No. 351, N.Y.L.J., Feb. 17, 1968; see also People v. Weingarten, 25 N.Y. 2d 639), I am, despite personal predilections, constrained to find that the film is not obscene.

I therefore dissent and vote to reverse the conviction and to dismiss the complaint.

Opinion of the Court of Appeals, State of New York (Filed December 1, 1971)

STATE OF NEW YORK
COURT OF APPEALS

- - - - - - - - - - - - - - - - -

App. T. 1. No. 184. 71
The People &c.,
Respondent,
vs.
Saul Heller,
Appellant.

- - - - - - - - - - - - - - - - -

BERGAN, J.:

The film "Blue Movie," subject of this prosecution under Penal Law, Section 235.05, is simple pornography unrelieved by any merit. Acts of sexual intercourse are portrayed, actual or simulated, accompanied by a series of sexual manifestations and movements.

The elements which must be established to satisfy the constitutional protection afforded by the First Amendment to freedom of expression as laid down by Roth v. United States (354 U.S. 476) are established in this prosecution. The statute itself meets the Roth standards (Overstock Book Co. v. Barry, 436 F.2d 1289 [2d Cir., 1970]).

Those elements justifying prosecution by the State and meeting Federal constitutional requirements are that the dominant theme of the production as a whole appeals to prurient interest in sex; is patently offensive as an affront to community standards; and is without redeeming social value (Redrup v. New York, 386 U.S. 767 [1967]; Memoirs v. Massachusetts, 383 U.S. 413 [1966]; Jacobellis v. Ohio, 378 U.S. 184 [1964]).

There are, of course, a number of cases holding that in particular publications or films these tests were not met and prosecution would not lie. A recent example is Cain v. Kentucky (397 U.S. 319) where the Court of Appeals of Kentucky (437 S.W. 2d 769) was reversed. It is not fruitful, however, by detailed differentials addressed to values that are better or worse, or to explicit or less explicit sexuality, to find guidance in deciding obscenity cases. Decision cannot reasonably be grounded on adding and subtracting obscenity points, one case to another.

The needs of adjudication must, as a practical matter, be met by such mature and objective judgment as judges are able to bring to it. A majority of this court, having viewed the film, is in agreement with the trial court and the Appellate Term that the film is obscene, and that prosecution is not interdicted by the First Amendment.

Appellant argues also that before the warrants issued for the seizure of the film and for his arrest, he was entitled to an adversary hearing before the judge who issued them on the question of the film's obscenity.

The procedure followed here was that the judge attended the public theatre at which the firm was exhibited and, on seeing it, concluded there was probable cause to institute prosecution and issued the warrants.

This independent judicial action met fully the basic rule laid down in Marcus v. Search Warrants (367 U.S. 717) as later analyzed in the several opinions in A Quantity of Books v. Kansas (378 U.S. 205); that the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision.

It was noted, on this issue in Marcus, that the warrants for a very large number of magazines and books (11,000 copies) were issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials" (pp. 731-732). That is certainly not this case. The warrants involved here were preceded by judicial scrutiny and were the result of judicial determination.

The additional question is whether the scrutiny should have been followed by an adversary hearing. The Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction (Lee Art Theatre v. Virginia, 392 U.S. 636 [1967]).

There a Virginia conviction was reversed on authority of Marcus (supra). Not only was there no judicial scrutiny in advance, but the policeman's affidavit, used as a basis for the warrant, was both subjective and general. There was an absence of "any inquiry by the justice of the peace into the factual basis for the officer's conclusions" (p. 637). Of course, that was not enough under Marcus.

But what is of relevancy for the present case is the observation by the Supreme Court that "we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant" (p. 637). This implies that had the justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required.

Thus the decisions of the Second Circuit in Astro Cinema Corp. v. Mackell (422 F.2d 293 [1970]) and Bethview Amusement Corp. v. Cahn (416 F.2d 410 [1969], cert. den. 397 U.S. 920), requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court.

There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to begin a prosecution.

But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the prima facie sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion.

There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute.

The order should be affirmed.

Opinion of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting

COURT OF APPEALS

[Same Title]

FULD, CH. J. (dissenting):

If I were to judge the film before us in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for its vulgarity no less than for its banality.* However, as we declared some years ago in People v. Richmond County News (9 N.Y.2d 578, 587-588), "[b]asic principles of jurisprudence * * * command us to put to one side all personal predilections." Faithful to this injunction, I cannot but conclude that, in the light of First Amendment concepts, as reflected in the decisions of the Supreme Court (see, e.g., Cain v. Kentucky, 397 U.S. 319, revg. ___ Ky. ___, ___, 437 S.W.2d 769, 774-775; Redrup v. New York, 386 U.S. 767), the motion picture under consideration, explicit though it is in exhibiting acts of sexual intercourse, may not be stamped as obscene. So concluding, I do not reach the further question concerning the necessity for an adversary hearing prior to the court's issuance of a warrant for the film's seizure.

* * * * * *

Order affirmed. Opinion by Bergan, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Gibson, J., concurs.

---

* It should be noted that no person under 18 years of age was ever admitted to the theatre where the picture was shown and that there was no claim of pandering or exploitation of its sexual content.

LE COPY

In The

Supreme Court of the United States

Supreme Court, U.
FILED
FEB 15 197
E. ROBERT SEAVER, C

No. 71-

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRVING ANOLIK and
JOEL M. WEINBERG
Attorneys for Petitioner
225 Broadway
New York, New York 10
732-3050

IRVING ANOLIK
Of counsel

(5096) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. New York, N.Y. Philadelphia, Pa.

TABLE OF CONTENTS

Page

Statement 1

Opinion Below 2

Jurisdiction 2

The Questions Presented for Review 2

Historical Facts 3

Argument:

Point I. The Court below blatantly defied the United States Court of Appeals for the Second Circuit by ruling that a movie film could be seized without a prior adversary hearing. This was diametrically contrary to recent holdings of the United States Court of Appeals to which the attention of the New York Court of Appeals was specifically called. This violated the supremacy clause of the United States Constitution and also the First and Fourteenth Amendments thereof. 6

Point II. The United States Court of Appeals for the Second Circuit specifically ruled in similar cases that a prior adversary hearing had to be held before the seizure of any film alleged to be obscene. No such adversary hearing was held in the case at bar and the New York Court

Page

of Appeals has decided to disobey the holding of the United States Court of Appeals for the Second Circuit. . . . 9

Point III. "Blue Movie" is not obscene and ought not have been banned for that reason alone. There was no claim of "pandering" or "exploitation of its sexual content." 10

Conclusion 11

Table of Citations

CASES CITED:

Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970) 3, 6, 7, 9, 10

A Quantity of Books v. Kansas, 378 U.S. 205 3

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied 397 U.S. 920 . . . . 3, 6, 7, 9, 10

Cain v. Kentucky, 397 U.S. 319 10

Gibbons v. Ogden (1824) 9 Wheat. 1, 6 L. Ed. 23 7

Lee v. Florida, 392 U.S. 378 7

Mapp v. Ohio, 367 U.S. 643 7

Contents

Page

Marcus v. Search Warrants, 367 U.S. 717. . . 3

Miranda v. Arizona, 384 U.S. 436 7

Redrup v. New York, 386 U.S. 767 10

Roth v. United States, 354 U.S. 476 3

Stanley v. Georgia, 394 U.S. 557 11

UNITED STATES CONSTITUTION CITED:

First Amendment 6

Fourteenth Amendment 6

RULES and STATUTES CITED:

28 U.S.C. Section 1257(3) 2

NEW YORK PENAL LAW:

Section 235.05 2

Appendix

Opinion of the Court of Appeals 1a

Order of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting. . . . 5a

Order of Appellate Term With Dissenting Memorandum, Markowitz, J. 7a

In The

Supreme Court of the United States

No. 71-

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

Petitioner, SAUL HELLER, prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York (the Chief Judge and an Associate Judge dissenting), rendered the 1st day of December, 1971, affirming the order of the Supreme Court of the State of New York, Appellate Term, First Department, one Justice dissenting, which in turn, had affirmed the judgment of the Criminal Court of the City of New York, convicting the petitioner of violating Section 235.05 of the New York Penal Law (obscenity in the portrayal of a motion picture — "Blue Movie," a product of the efforts of Andy Warhol).

The petitioner herein is an attorney at law and was sentenced to pay a fine of $250 or 30 days in jail. The fine has been paid.

Opinion Below

The Opinion of the New York Court of Appeals is reproduced in the Appendix to this petition. The Order and Dissent of the Appellate Term is also included.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3). The Order of the New York Court of Appeals was rendered the 1st day of December, 1971 and this petition is being filed within 90 days thereof. A copy of the Order of Affirmance is annexed hereto and reproduced in the Appendix.

The Questions Presented for Review

1. Whether a State Court (New York Court of Appeals) may blatantly disobey a ruling of the United States Court of Appeals by refusing to grant an adversary hearing prior to the seizure of a movie film, in view of the determination by the United States Court of Appeals, Second Circuit,

that such an adversary hearing is required?

2. A movie film entitled "Blue Movie," restricted to audiences over the age of 18 years, was seized without a prior adversary hearing having been afforded to the petitioner. Since the United States Court of Appeals for the Second Circuit ruled that a prior adversary hearing must be granted in such cases, did the New York Court of Appeals violate the supremacy clause of the United States Constitution, as well as the First and Fourteenth Amendments thereof, by holding that the courts of the State of New York need not grant prior adversary hearings in such cases? (Bethview Amusement Corp. v. Cahn, 416 F.2d 410 [1969], cert. denied 397 U.S. 920; Astro Cinema Corp. v. Mackell, 422 F.2d 293 [1970].)

3. Whether a movie film may ever be seized without a prior adversary hearing?

4. Whether the film here in question, "Blue Movie," was in fact obscene within the purview of Roth v. United States, 354 U.S. 476, in view of the facts that there was no pandering or solicitation, and no one under the age of 18 was permitted to buy a ticket or to see the film?

5. Whether a movie film which may be viewed by thousands of people can be equated with a single book, or should it be equated with many books (Marcus v. Search Warrants, 367 U.S. 717; and, A Quantity of Books v. Kansas, 378 U.S. 205)?

Historical Facts

The factual situation is not of paramount importance. The petitioner was manager of the

Garrick Theatre on Bleeker Street in Greenwich Village which, on July 29, 1969, was showing a movie called "A Blue Movie" [sic]. There is no doubt but that absolutely no one under the age of 18 years was permitted into the theatre and that there was no pandering or solicitation for patrons to enter the theatre.

On July 31, 1969, a criminal court judge, Honorable Arthur H. Goldberg, at the request of Assistant District Attorney Beckler, went to this theatre and viewed the movie between 3:40 p.m. and 5:20 p.m.

This viewing was precipitated by an earlier attendance at the theatre by two police officers on July 29, 1969, namely Deputy Inspector Charles Smyth and Lieutenant Sullivan (Smyth 24-27; Goldberg 14, 16-19).*

Immediately after the showing of the movie, without any notice to the petitioner, and without any adversary hearing, the Judge signed a search warrant right outside of the theatre ordering the seizure of the film and also executed three arrest warrants because

> "It was and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg 14-15, 23).

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. All of the judges in the courts below viewed the film and, in each instance, the movie was ruled obscene although there were dissents, namely two judges, including the Chief Judge and an associate judge in the Court of Appeals, and one justice in the Appellate Term of the Supreme Court.

---

* Numerals in parentheses refer to the Record on Appeal in the Court of Appeals of New York.

It is not relevant to this petition to go into all of the facts beyond this since this recitation crystallizes the issues. There were differences of opinion as to whether or not the movie was or was not obscene. This is one major issue raised in this Court. Perhaps a more important issue, however, is whether or not an adversary hearing should have been held prior to the issuance of the search warrant since there was no emergency nor was there any danger to the community. A seizure of this film effectively precluded further showings since there were no other prints readily available.

THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE IS PROPERLY BEFORE THIS COURT.

The respondent has previously conceded that the petitioner properly preserved the issue of unlawful search and seizure and was anxious for the return of the film which had been seized. The respondent, in the Court below, in its brief on page 20, admitted:

> "It appears therefore that in the unusual circumstances here, the issue of the seizure was preserved for review."

There is, therefore, no dispute between the parties hereto about the jurisdiction of this Court to review the issues being raised, namely whether or not a seizure of the film was justified without an adversary hearing having been held, and whether or not the prosecution was justified in retaining the film, as it still does.

Argument

Point I.

THE COURT BELOW BLATANTLY DEFIED THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BY RULING THAT A MOVIE FILM COULD BE SEIZED WITHOUT A PRIOR ADVERSARY HEARING. THIS WAS DIAMETRICALLY CONTRARY TO RECENT HOLDINGS OF THE UNITED STATES COURT OF APPEALS TO WHICH THE ATTENTION OF THE NEW YORK COURT OF APPEALS WAS SPECIFICALLY CALLED. THIS VIOLATED THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND ALSO THE FIRST AND FOURTEENTH AMENDMENTS THEREOF.

The case at bar presents a conflict which should be resolved by this Court since the United States Court of Appeals and the New York Court of Appeals have taken diametrically opposite positions on the same issue.

In the case at bar, the New York Court of Appeals was apprised of the rulings of the United States Court of Appeals for the Second Circuit in the cases of Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), and Bethview Amusement

Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied 397 U.S. 920.

In both the Astro Cinema Corp. and the Bethview cases, the Second Circuit specifically declared that adversary hearings were required before warrants could be issued for the seizure of a movie film.

In rejecting this view, the New York Court of Appeals' majority declared, inter alia:

> "...The decisions of the Second Circuit in Astro Cinema Corp. v. Mackell ... and Bethview Amusement Corp. v. Cahn ..., requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court."

The supremacy clause of the United States Constitution, Article VI, Section 2, requires that State courts defer to Federal courts in such conflicts (Gibbons v. Ogden [1824], 9 Wheat. 1, 6 L. Ed. 23).

In such other cases as Mapp v. Ohio, 367 U.S. 643 and Miranda v. Arizona, 384 U.S. 436, this Court has pre-empted State courts' decisions in the area of search and seizure and confessions respectively, and has directed that where inconsistent with the determinations of this Court, the State courts must change their determinations. This is also exemplified by the decision in Lee v. Florida, 392 U.S. 378.

The issue, therefore, in the case at bar, is very clearly framed since it is manifest that where the State of New York's highest Court deliberately refuses to obey a determination of the United States Court of Appeals, that a serious jurisdictional conflict is presented which should be resolved by this Court. This is especially so where the State's highest Court declares that it is obeying the policies of the United States Supreme Court in its refusal to obey the determinations of the United States Court of Appeals.

If this Court fails to resolve this conflict, litigants will obtain one result in the Federal Court of Appeals, but a different result in the New York State courts. This would be an intolerable situation.

It is respectfully submitted that the United States Court of Appeals is correct and that the First Amendment as well as the Fourteenth Amendment requires that prior adversary hearings be granted before a movie film is seized.

In the case at bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available.

Even if that were not the case, however, the risk of criminal prosecution and further seizure would be adequate deterrents. In addition, the petitioner, as well as the owners of the film, have suffered tremendous economic loss.

We submit that the respondent is probably just as anxious to resolve this dilemma.

Point II.

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SPECIFICALLY RULED IN SIMILAR CASES THAT A PRIOR ADVERSARY HEARING HAD TO BE HELD BEFORE THE SEIZURE OF ANY FILM ALLEGED TO BE OBSCENE. NO SUCH ADVERSARY HEARING WAS HELD IN THE CASE AT BAR AND THE NEW YORK COURT OF APPEALS HAS DECIDED TO DISOBEY THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

This Court is faced with a conflict between two jurisdictions, namely the State of New York and the Second Circuit. In the case at bar, a film was seized without a prior adversary hearing having been held. A motion to suppress and to return the film is properly before this Court and, in addition, the issue of whether or not an adversary hearing ought to have been held is likewise directly raised. In Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), and Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied, 397 U.S. 920, the Court of Appeals for the Second Circuit declared that a prior adversary hearing had to be permitted and conducted before any seizure of a movie film could constitutionally be effectuated.

The New York Court of Appeals has decided to ignore this ruling, thus placing it in direct conflict with the United States Court of Appeals in this Circuit.

It is indeed a dangerous precedent which is being set.

We submit that this Court should resolve this conflict. For the reasons set forth in Astro Cinema Corp., supra, and Bethview Amusement Corp., supra, this Court should direct that an adversary hearing must be held prior to the seizure of any film.

No emergency is presented by the showing of a film such as the one in the case at bar where, admittedly, no one under the age of 18 was permitted to see it and there is no indication that there was any pandering or solicitation.

Point III.

"BLUE MOVIE" IS NOT OBSCENE AND OUGHT NOT HAVE BEEN BANNED FOR THAT REASON ALONE. THERE WAS NO CLAIM OF "PANDERING" OR "EXPLOITATION OF ITS SEXUAL CONTENT."

It is submitted that since there is no claim of "pandering" or "exploitation of the sexual content" of "Blue Movie," coupled with the fact that no one under 18 could gain admittance, that the movie was not "obscene" and should not have been seized and banned (see, Dissent in Court of Appeals by Chief Judge Fuld and Judge Gibson, infra).

Cain v. Kentucky, 397 U.S. 319;
Redrup v. New York, 386 U.S. 767.

The movie does not show any perverted acts of contacts between the actors and there are numerous films now being shown which are far more explicit than anything shown in the "Blue Movie."

Since Stanley v. Georgia, 394 U.S. 557, prohibits seizure of any film used for private recreation of a non-commercial nature, we maintain that it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it. Why ought any adult be deprived of the right to see any form of entertainment which does not cause any clear and present danger to society?

The suppression of a movie such as the one herein, banal perhaps, but certainly not a threat to law and order, smacks of "thought control" and is a clear violation of the First and Fourteenth Amendments. This Court should once and for all put an end to the selective suppression of material within the First Amendment's purview.

Conclusion

The Petition for Certiorari should be granted and the Judgment Convicting the Petitioner Heller should be reversed and the film returned.

Respectfully submitted,

IRVING ANOLIK and
JOEL M. WEINBERG
Attorneys for Petitioner
225 Broadway
New York, New York 10007

IRVING ANOLIK,
Of Counsel.

APPENDIX

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

- - - - - - - - - - - - - - - - -

App. T. 1. No. 184. 71
The People &c.,
Respondent,
vs.
Saul Heller,
Appellant.

- - - - - - - - - - - - - - - - -

BERGAN, J.:

The film "Blue Movie," subject of this prosecution under Penal Law, Section 235.05, is simple pornography unrelieved by any merit. Acts of sexual intercourse are portrayed, actual or simulated, accompanied by a series of sexual manifestations and movements.

The elements which must be established to satisfy the constitutional protection afforded by the First Amendment to freedom of expression as laid down by Roth v. United States (354 U.S. 476) are established in this prosecution. The statute itself meets the Roth standards (Overstock Book Co. v. Barry, 436 F.2d 1289 [2d Cir., 1970]).

Those elements justifying prosecution by the State and meeting Federal constitutional requirements are that the dominant theme of the production as a whole appeals to prurient interest in sex; is patently offensive as an affront to community standards; and is without redeeming social value (Redrup v. New York, 386 U.S. 767 [1967]; Memoirs v. Massachusetts, 383 U.S. 413 [1966]; Jacobellis v. Ohio, 378 U.S. 184 [1964]).

There are, of course, a number of cases holding that in particular publications or films these tests were not met and prosecution would not lie. A recent example is Cain v. Kentucky (397 U.S. 319) where the Court of Appeals of Kentucky (437 S.W. 2d 769) was reversed. It is not fruitful, however, by detailed differentials addressed to values that are better or worse, or to explicit or less explicit sexuality, to find guidance in deciding obscenity cases. Decision cannot reasonably be grounded on adding and subtracting obscenity points, one case to another.

The needs of adjudication must, as a practical matter, be met by such mature and objective judgment as judges are able to bring to it. A majority of this court, having viewed the film, is in agreement with the trial court and the Appellate Term that the film is obscene, and that prosecution is not interdicted by the First Amendment.

Appellant argues also that before the warrants issued for the seizure of the film and for his arrest, he was entitled to an adversary hearing before the judge who issued them on the question of the film's obscenity.

The procedure followed here was that the judge attended the public theatre at which the firm was exhibited and, on seeing it, concluded there was probable cause to institute prosecution and issued the warrants.

This independent judicial action met fully the basic rule laid down in Marcus v. Search Warrants (367 U.S. 717) as later analyzed in the several opinions in A Quantity of Books v. Kansas (378 U.S. 205); that the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision.

It was noted, on this issue in Marcus, that the warrants for a very large number of magazines and books (11,000 copies) were issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials" (pp. 731-732). That is certainly not this case. The warrants involved here were preceded by judicial scrutiny and were the result of judicial determination.

The additional question is whether the scrutiny should have been followed by an adversary hearing. The Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction (Lee Art Theatre v. Virginia, 392 U.S. 636 [1967]).

There a Virginia conviction was reversed on authority of Marcus (supra). Not only was there no judicial scrutiny in advance, but the policeman's affidavit, used as a basis for the warrant, was both subjective and general. There was an absence of "any inquiry by the justice of the peace into the factual basis for the officer's conclusions" (p. 637). Of course, that was not enough under Marcus.

But what is of relevancy for the present case is the observation by the Supreme Court that "we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant" (p. 637). This implies that had the justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required.

Thus the decisions of the Second Circuit in Astro Cinema Corp. v. Mackell (422 F.2d 293 [1970]) and Bethview Amusement Corp. v. Cahn (416 F.2d 410 [1969], cert. den. 397 U.S. 920), requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court.

There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to begin a prosecution.

But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the prima facie sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion.

There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute.

The order should be affirmed.

Order of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting

COURT OF APPEALS

[Same Title]

FULD, CH. J. (dissenting):

If I were to judge the film before us in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for its vulgarity no less than for its banality.* However, as we declared some years ago in People v. Richmond County News (9 N.Y.2d 578, 587-588), "[b]asic principles of jurisprudence * * * command us to put to one side all personal predilections." Faithful to this injunction, I cannot but conclude that, in the light of First Amendment concepts, as reflected in the decisions of the Supreme Court (see, e.g., Cain v. Kentucky, 397 U.S. 319, revg. ___ Ky. ___, ___, 437 S.W.2d 769, 774-775; Redrup v. New York, 386 U.S. 767), the motion picture under consideration, explicit though it is in exhibiting acts of sexual intercourse, may not be stamped as obscene. So concluding, I do not reach the further question concerning the necessity for an adversary hearing prior to the court's issuance of a warrant for the film's seizure.

* * * * * *

Order affirmed. Opinion by Bergan, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Gibson, J., concurs.

---

* It should be noted that no person under 18 years of age was ever admitted to the theatre where the picture was shown and that there was no claim of pandering or exploitation of its sexual content.

Order of Appellate Term With Dissenting Memorandum, Markowitz, J.

Appellate Term — First Department
Dated — July 15, 1971

97 PEOPLE, & CO., res. v. SAUL HELLER, def-ap — Judgment of conviction affirmed. No opinion. Streit, J.P. and Quinn, J. concur.

Markowitz, J. dissents in the following dissenting memorandum.

Whether the film before us is obscene is a question of constitutional judgment — a mixed question of fact and constitutional law — calling upon the court to make an appraisal of the film and its contents against the requirements embodied in both the State and Federal constitutions (People v. Richmond County News, 9 N.Y. 2d 578, 581).

Sex and obscenity are not synonymous (Roth v. United States, 364 U.S. 476, 487). The problem of drawing "the dim and uncertain line" between proscribed obscenity and constitutionally protected expression is indeed thorny — and I recognize that this film may possibly be found to be utterly without redeeming social value. However, under the guidelines established by the United States Supreme Court and our Court of Appeals (Memoirs v. Massachusetts, 383 U.S. 413; Roth v. United States, supra, 354 U.S. 476; People v. Solomon, 26 N.Y. 2d 631, aff'g determination of this court, September, 1967, No. 351, N.Y.L.J., Feb. 17, ...

* * *

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
FILED
APR 14 1972
MICHAEL RODAK, JR., CLERK

No. 71-1043

SAUL HELLER,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

PAGE

reliminary Statement 1

uestions Presented 2

tatement of the Case 2

rgument

Point I—The writ of certiorari should be granted to determine whether a state judge, who has seen a film, may properly issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity 11

Point II—The New York State courts properly applied constitutional standards in determining the film to be obscene; no substantial constitutional question warranting review is presented 13

onclusion 18

TABLE OF AUTHORITIES

ases:

Quantity of Books v. Kansas, 378 U.S. 205 (1964) 12

stro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970) 10, 12

ethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied* 397 U.S. 920 (1970) 10, 12

yrne v. Karelexis, 401 U.S. 216 (1971) 12

ain v. Commonwealth, 437 S.W.2d 769 (Ky. 1969), *rev'd* 397 U.S. 319 (1970) 16

PAGE

Jacobellis v. Ohio, 378 U.S. 184 (1964) 14, 15

Karelexis v. Byrne, 306 F.Supp. 1363 (D. Mass. 1969), *rev'd* 401 U.S. 216 (1971) 16

Landua v. Fording, 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), aff'd 388 U.S. 456 (1967) 17
Lee Art Theatres, Inc. v. Virginia, 392 U.S. 363 (1968) 12

Manual Enterprises v. Day, 370 U.S. 478 (1962) 14, 15
Marcus v. Search Warrants, 367 U.S. 717 (1961) 12
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 14, 15
MOD Amusement Corp. v. Murphy, 335 F.Supp. 1267 (S.D.N.Y. 1972) 12

New York Feed Co., Inc. v. Leary, 397 U.S. 98 (1970), aff'g Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D.N.Y. 1969) 14

Overstock Book Company v. Barry, 436 F.2d 1289 (2d Cir. 1970) 14

People v. G.I. Distributors, 20 N.Y.2d 104 (1967) 17
People v. Heller, 29 N.Y.2d 319 (1971) 10, 11
People v. Richmond County News, 9 N.Y.2d 578 (1961) 17

Rabe v. Washington, —— U.S. —— (March, 1972) 11
Redrup v. New York, 386 U.S. 767 (1967) 14, 15, 16
Roth v. United States, 354 U.S. 476 (1957) 15

Stanley v. Georgia, 394 U.S. 557 (1969) 17

United States v. A Motion Picture Entitled "I Am Curious (Yellow)", 404 F.2d 196 (2d Cir. 1968) 16
United States v. 35 mm. Motion Picture Film Entitled "Language of Love," 432 F.2d 705 (2d Cir. 1970) 14
United States v. Reidel, 402 U.S. 351 (1971) 17

PAGE

Wagenheimer v. Maryland State Board of Censors, 255 Md. 297, 258 A.2d 240 (1970), aff'd sub nom. Grove Press, Inc. v. Maryland State Board of Censors, 401 U.S. 480 (1970) 16

Younger v. Harris, 401 U.S. 37 (1971) 12

Statutes:

New York Penal Law, §255.05 .... 2, 13, 14, 15
28 U.S.C. §1657(3) 11

Miscellaneous:

Denzer & McQuillan, Practice Commentary, New York Penal Law §235.00, McKinney ed., pp. 86-90 15

[illegible]

[illegible]

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968)

[illegible]

Marcus v. Search Warrants, [illegible]

[illegible] v. Massachusetts, 383 U.S. 413 (1966)

[illegible]

[illegible]

[illegible]

Overstock Book Company v. Barry, 436 F.2d 1289 (2d Cir. 1970)

People v. G.I. Distributors, 20 N.Y.2d 104 (1967)

People v. Heller, 29 N.Y.2d 319 (1971)

People v. Richmond County News, 9 N.Y.2d 578 (1961)

Rabe v. Washington, ___ U.S. ___ (March, 1972)

Redrup v. New York, 386 U.S. 767 (1967)

Roth v. United States, 354 U.S. 476 (1957)

Stanley v. Georgia, 394 U.S. 557 (1969)

United States v. A Motion Picture Entitled "I Am Curious (Yellow)", [illegible]

United States v. 35 Mm. Motion Picture Film Entitled "Language of Love", [illegible]

United States v. Reidel, 402 U.S. 351 (1971)

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1043

SAUL HELLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI

Preliminary Statement

This brief is in response to a petition for a writ of certiorari which seeks to review a judgment of the Court of Appeals of the State of New York, entered December 1, 1971, which affirmed a judgment of the Appellate Term, First Department, entered July 15, 1970, which affirmed a judgment of the Criminal Court of the City of New York, New York County, rendered September 17, 1969, convicting

Saul Heller of Obscenity (N.Y. Penal Law §235.05), and sentencing him to pay a fine of two hundred fifty dollars or to serve thirty days in jail. The fine was paid.

Questions Presented

Whether a state judge who has seen an allegedly obscene film may issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

Whether the New York courts properly applied constitutional standards in judging the film "Blue Movie" obscene.

Statement of the Case

On July 31, 1969 Judge Goldberg of the New York Criminal Court, at the request of an assistant district attorney of New York County, attended a performance of "Blue Movie" at the Garrick Theatre in Manhattan.

Immediately after the showing of the entire film, and without any discussions with the accompanying police inspector, Judge Goldberg stepped out of the theater, and signed a search warrant for the seizure of the film, and three arrest warrants, because "it was, and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg, 14-15, 20; see Smyth, 27, 30, 36, 46).[*] No one at the theater was notified prior to the issuance of the warrants (Goldberg, 23).

---

[*] References, unless otherwise noted, are to the pages of the record on appeal in the New York Court of Appeals.

The film was seized. The three "John Doe" arrest warrants were for the petitioner, Saul Heller, the theater manager, and two employees—the ticket taker and the projectionist, Susan Epstein and Mark Kern. The film was seized and was the subject of the instant obscenity charge. The cases against Epstein and Kern were dismissed on the prosecutor's motion (7-8).

Trial was held before a panel of three judges on September 16 and 17, 1969. The People's proof consisted of the evidence concerning the seizure and the film itself. The following summary of the film's content, prepared by respondent's counsel, is for the Court's convenience.

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. The movie can perhaps be divided into five major sections, *i.e.*, pre-coital, intercourse, post-coital, dinner and shower scenes.

The movie opens without any titles or credits and the only actors in the film appear fully clothed—the female in pants and a diaphanous blouse, the male in a shirt, a pair of pants and socks—on a set which consists solely of one large bed. During the extended pre-coital and intercourse scenes (approximately 45 minutes), the actors undress themselves and are pictured lying in bed. During this "petting" sequence, the actors fondle each other, undress and continue fondling each other. The actors' genital regions are explicitly shown as they repeatedly manipulate each other's genital organs.

The actors then engage in sexual acts of real or simulated intercourse. One scene displays the female astride the male fondling his penis and then attempting to insert the semi-erect organ into her vaginal area. After turning to a male-superior position, shown in a sequence with the camera turned toward the couple from between their feet, the copulating couple turns so that the male is portrayed in profile on top of the female engaged in an act of intercourse. During these scenes, the camera is stationary and there is no close-up photography. However, the actors do express an awareness of the existence of the camera by commenting on this fact in their conversations. Throughout the entire scene the actors converse on diverse topics concerning a variety of mundane topics—*e.g.*, what they did during the past week, with whom they had previously had intercourse, impressions of mutual friends. Some of these conversations are not understandable because the sound track is unintelligible or non-existent. The judges at the trial level indicated that they could not understand the sound and at points remarked that "the sound is dead * * * although we can observe the actors are talking to each other" (48).

During the entire post-coital period (approximately twenty-five minutes), the two participants are pictured unclothed and fondling each other's genital organs. Their genital regions are explicitly shown. The couple engage in conversation, which is sometimes hard to hear because the sound is distorted, the topics range from the Vietnam War to the qualifications of Mayor Lindsay. The topics shift, following no particular pattern, and showing no insight, few ideas, and nothing beyond the thoughts in newspaper headlines.

The actors dress and prepare a meal. Parts of the sound track are unintelligible or non-existent during this period.

Finally, the couple undress and shower themselves. During this sequence (approximately twenty minutes), the actors are explicitly shown engaging in mutual manual genital stimulation. The camera "technique" shifts from the static single-distance pictures to a series of close-ups of portions of the male and female anatomy. Several acts of either actual or simulated intercourse occur in the bathtub, while the couple sing a "song" whose only clearly identifiable line is "down on me." At the end, during actual or simulated intercourse, they make loud animal noises. There are no closing titles or credits.

The defense called three expert witnesses. One, Parker Tyler, a 65-year-old author of six books about motion pictures, who had occasionally written magazine articles and given lectures about films, had seen "Blue Movie" about a year before the trial and had written a chapter about it in one of his books. The movie, produced by Andy Warhol, "represents what might be called the attitude of the cool world toward sex" (72-80). The "cool world" is "an attitude of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction" (89-91, 96-7). This attitude is displayed "through the acts" and the topic of conversation is "irrelevant and immaterial" (87). There is no story line or plot line (87-8); the dialogue in Warhol films is usually improvised (92). The witness did not find the movie sexually stimulating, lewd,'' agreeing that "the picture that merely titillates * * * is lewd, but a picture that actually shows copulation is not lewd'' (91-2). The "spirit'' of the picture and the fact that "the woman seems quite bored [and] gives very little cooperation to the man'' distinguishes the film from the "sexploitation'' movies (93-4).

The term "blue movies'' has a special meaning in the motion picture industry; in "common parlance'' the term applies to "stag movies'' (Tyler, 82-4; *see also,* Winick, 110-11). In the advertising the film was called "Blue Movie'' although the original name was "Fuck'' (Tyler, 83-4).

The second expert, Charles Winick, a 47-year-old professor of sociology at the City University who had been a consultant to numerous commissions studying the effects of mass communications on children, and who had written numerous articles and books, testified that in his opinion "Blue Movie'' had a social value (99-104); it shows "a growing and important point of view about sexual behavior * * * a film which enables people to explore their own attitudes in a constructive way,'' and "it has a certain amount of clinical interest in the presentation of two different character types, a non-responsive woman * * * and an aggressive fellow'' (104-5).

The movie showed that the woman was not cooperative "to the extent that her boy friend appeared to wish''

1, 124). Although the witness was uncertain whether re was actual penetration, because of the lack of close-, "I would say that it is likely that in fact they had en-ged in sexual intercourse." He would also say that it s the intention of the film to convey the impression that y had (106-7). The movie has value in clinical classes nedical school or for psychiatric residents. At first the ness stated he would not present it to a college age up; he later changed his mind (121-3). Essentially, ce the sex act was presented without frills, and was trayed realistically, his "own feeling is that it would arly be a sexual depressant"; "a realistic showing of act of intercourse would not titillate the public" (105-6, -10, 129-35). The conversation between the actors does "lend credence to the socially redeeming value," but ws the jumping about between topics that actually urs during intimate moments; the particular topics dis-sed "is extremely important" (112-14). The actors wed a consciousness of being filmed; indeed, on occasion y spoke about the movie or concerning a particular w; thus the audience relates to the film's director (114-. The movie emphasizes the realism in the incident, hout accenting the highs and lows of the sexual experi-e (113, 118-19). The uneven sound track and occasional k of focus help convey the sense of reality (127-8).

The other expert, Thomas Phillips, a 27-year-old writer radio station WQXR and various publications, testified t he had written an article about "Blue Movie" for The lage Voice; he believed that the movie had social value, t is, it was "about the political and social situation in s country today" (141-3, 171-2). The movie conveyed the actors' disaffection with society and their "powerlessness" to control it; their solution was "to stay home, to refuse to contend with the situation and to find what happiness you can in private personal relationships" (143-4, 147-8, 158-69). The witness noted that the film contained "a great deal of conversation" (148). The sound track was designed to be partly inaudible because it portrayed realism (145-6). There was, however, "an organic connection between the sexual intercourse scene and the political scene. To express it very succinctly, * * * I think the sexual intercourse was an emblem of the alternative of struggling against corruption and disorder in society" (153-4). "It was a very benign view of sexual intercourse in a friendly case [*sic*]" (154-6). In response to a question from the Presiding Judge, "Could you say that the * * * photographic depiction of the intercourse, and the manipulation of the male's private organ, was a tasteful way of showing the actors' dissent with taxes, war and politics?", the witness replied, "I think that it was a tasteful thing * * * [because] it was so realistic that it was relatively normal compared to the hysteria and exaggeration that appear in the cleverly censored sex films" (164-5).

The petitioner testified that he had been the manager of the Andy Warhol Garrick Theatre for two years. He stated that when "Blue Movie" was playing at his theater there had been a sign at the box office with an "X" and a notice that no one under 17 was admitted (177-9). Mr. Heller instructed each of the employees, ticket cashers and ushers, that persons obviously under 18 years old were to be excluded (180-4). He had seen the picture before his arrest (183).

At the end of the People's case and at the end of the entire case petitioner moved to dismiss, emphasizing the alleged constitutional defects in the search-and-seizure procedure. The petitioner was found guilty by a unanimous court, which rendered the following opinion:

> "The Presiding Judge: We have listened with great interest to the testimony, and the very able argument by counsel on both sides.
>
> "It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.
>
> "We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.
>
> "With respect to the absence of adversary proceeding as provided in the [former N.Y.] Code of Criminal Procedure, Section 22a, I think we are in agreement, Counsel has indicated there is no provision for an adversary proceeding under that section with respect to motion picture films.
>
> "We find that the motion picture in question is hard core pornography, see People versus Richmond County News * * * New York 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F. 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104, under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work

> and material in question has redeeming social value. That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. The expert testimony in this case presented by the defendant is not persuasive." (214-16).

The petitioner was thereafter sentenced to pay a fine of $250 or to serve thirty days in jail. He paid the fine.

On appeal to the Appellate Term, Heller contended that since the film is not obscene the court below incorrectly found him guilty. He also argued that the film should not have been seized pursuant to a search warrant, because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant.

The Appellate Term, after seeing the film, affirmed the conviction, without opinion. One justice dissented on the ground that the film was not obscene.

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an *ex parte* judicial determination is necessary before an obscene film may be seized. He also asserted that "Blue Movie" is not obscene.

In that Court, the five-judge majority, after having viewed the film, found it to be obscene. The majority also rejected the argument that this Court's decision mandates an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the

Second Circuit, in *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (1969), *cert. denied* 397 U.S. 920 (1970) and *Astro Cinema Corp.* v. *Mackell,* 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." *People* v. *Heller,* 29 N.Y.2d 319 (1971). The two-judge dissenting opinion, written by the Chief Judge, contends that the film is not obscene and that the search and seizure issued need not be reached.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1657(3).

ARGUMENT

POINT I

The writ of certiorari should be granted to determine whether a state judge, who has seen a film, may properly issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

This case presents the Court with a proper record upon which to resolve an issue of great concern to law enforcement in the area of obscenity law: must a person being charged with promoting obscenity be accorded a hearing prior to the issuance of a search warrant authorizing the seizure of an allegedly obscene film? The question was recently before this Court, but was not reached. *Rabe* v. *Washington,* No. 71-247, —— U.S. —— (March , 1972). In the case at bar, the New York Court of Appeals held that an adversary hearing was unnecessary. *People* v. *Heller,* 29 N.Y.2d 319. The United States Court of Appeals for the Second Circuit has said that one is, *Bethview Amusement Corp.* v. *Cahn,* 16 F 2d 410 (1969), *cert. denied* 397 U. S. 920 (1970); *Astro Cinema Corp.* v. *Mackell,* 422 F 2d 293 (1970). The difference in conclusions and results on this federal constitutional issue, rendered by two highly respected courts in the same jurisdiction, is one that is best resolved by this Court.

This issue is now ripe for adjudication. It is squarely presented by this case. It is not likely that the federal courts in this Circuit will agree with New York State's highest court's interpretation of this Court's decisions in *Marcus* v. *Search Warrants,* 367 U. S. 717 (1961), *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964), and *Lee Art Theatres, Inc.* v. *Virginia,* 392 U. S. 363 (1968). Indeed, subsequent to the decision in the New York Court of Appeals in the case at bar, the federal courts in this circuit have adhered to their prior view. See, *e.g. MOD Amusement Corp.* v. *Murphy,* 335 F. Supp. 1267 (S.D.N.Y.) motion for stay denied Jan. 12, 1972 (2d Cir.). Those cases, which present other issues [*cf., e.g., Younger* v. *Harris,* 401 U. S. 37 (1971); *Byrne* v. *Karelexis,* 401 U. S. 216 (1971)], would not present as clear a record as does the case at bar, on the constitutional issues regarding the seizure of the film.

Not only is there an irreconcilable disagreement between the state and federal courts, but the issue is one of practical importance. Nearly all obscenity prosecutions require the production, in court, of the corpus. In an area such as New York City, which is inundated with smut of all descriptions, law inforcement requires the use of some speedy, effective device for that production. The State's highest court and Legislature have authorized the issuance of search warrants, coupled with prior judicial scrutiny of the material, for that purpose. The federal courts have encumbered the procedure by requiring a prior adversary hearing.

POINT II

The New York state courts properly applied constitutional standards in determining the film to be obscene; no substantial constitutional question warranting review is presented.

The trial court and state appellate courts, each after seeing the entire film, found that "Blue Movie" was obscene under the New York Penal Law. The only substantial question concerning the film's obscenity is whether the proper standards were applied. Petitioner, although contending that the courts below misinterpreted the constitutional tests (petition, pp. 10-11), has shown nothing to establish that claim. The state courts properly applied the statutes and constitutional law that govern the case.

The New York statute contains the proper ascertainable standards of guilt. Section 235.05 of the New York Penal Law states that:

> "A person is guilty of obscenity when, knowing its contents and character, he:
> 1. Promotes, or possesses with intent to promote any obscene material; * * *"

The term "obscene" is defined in Penal Law Section 235.00(1) as follows:

> "* * * Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal

> is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

These statutory provisions reflect precisely the standards contained in this Court's decisions governing obscenity prosecutions. *New York Feed Co., Inc.* v. *Leary,* 397 U.S. 98 (1970), *affirming Milky Way Productions, Inc.* v. *Leary,* 305 F. Supp. 288 (S.D.N.Y. 1969) (three-judge court). "That §235.00 of the New York Penal Law conforms to the standards of *Roth* and the cases following that decision is beyond question." *Overstock Book Company* v. *Barry,* 436 F.2d 1289, 1293 (2d Cir. 1970). These decisions hold that three elements must be proven. The prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. *Redrup* v. *New York,* 386 U.S. 767 (1967); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966); *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478 (1962); *cf. United States* v. *35mm Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2d Cir. 1970). As indicated by the drafters of the Penal Law, the definition of "obscenity" contained in Section 235.00(1) incorporates fully and is identical to the federal standards enunciated in *Roth, Jacobellis, Redrup* and *Manual Enterprises, supra.* See Denzer and McQuillan, *Practice Commentary, N.Y. Penal* Law §235.00, McKinney ed., pp. 86-90. "Obscenity," then, embraces merely that form of expression which is beyond the purview of the First Amendment.

The state court's conclusion was amply warranted. The film portrays acts of sexual intercourse interspersed with irrelevant dialogue, showing incidents such as acts of sexual intercourse in the bathtub, manipulation of male genitals by the female in the shower ["rais[ing] it from a flaccid state to at least a semi-erect state" (see 124)], and intercourse on the bed [where "the audience saw the female astride the male, and assisting his erect penis into her vaginal area" (see 51-2)] (see 161). The entire picture is devoted to sexual activity in such a way that the court cannot be faulted for concluding that it appealed "to prurient, shameful or morbid interest in nudity [or] sex," and that it went "substantially beyond customary limits of candor in describing or in presenting such matters." N.Y. Penal Law §235.00(1).

And the finders of the facts, having heard the experts presented by the defense, properly rejected their testimony, stating that it "was not persuasive" (215-16), and concluded that the film "is utterly without redeeming social value." Penal Law §235.00(1). The experts claimed to find that value of the film was in its presentation of the "cool world's" attitude toward sex (Tyler), its view about sexual behavior (Winick), and its presentation of the political and social situation (Phillips). The trial court could have rejected these theories, finding them to be no more than an attempt to find a use for the rambling, random "dialogue" in what would otherwise be a "stag film." Unlike the movie in *United States* v. *A Motion Picture Film Entitled "I am Curious (Yellow)"*, 404 F.2d 196 (2d Cir. 1968), where the court found an idea in the film and an attempt at artistic presentation, the film in question here has no such values. Indeed, even a movie such as "I am Curious," which has a plot, and, as the Second Circuit held, redeeming social value, has been held to be obscene in some jurisdictions. *Wagenheimer* v. *Maryland State Board of Censors,* 255 Md. 297, 258 A.2d 240 (1970); *aff'd, sub nom. Grove Press, Inc.* v. *Maryland State Board of Censors,* 401 U.S. 480 (1971) (equally divided court); see also *Karelexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), *rev'd on other grounds,* 401 U.S. 216 (1971). There is no predominant theme in "Blue Movie," except for the depicting of sexual acts. But even these acts do not have the redeeming value of being instructive or informative, as in *United States* v. *35 mm. Motion Picture Film Entitled "Language of Love," supra.* Nor does "Blue Movie" show merely titillating pictures of portions of the bodies of "actors" engaged in intercourse or merely photographs of naked women, which the Kentucky Supreme Court found obscene in "I, A Woman." *Cain* v. *Commonwealth,* 437 S.W.2d 769 (1969). Thus the Court's per curiam reversal in *Cain,* simply citing *Redrup, supra,* does not mean that the instant film is not obscene. *Cain* v. *Kentucky,* 397 U.S. 319 (1970).

Indeed "Blue Movie" is much like "Un Chant d'Amour," which was held to be obscene in *Landau* v.

Fording, 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), *aff'd*, 388 U.S. 456 (1967). Despite some expert testimony that the film dealt with prison problems, the California courts, as affirmed by this Court, upheld the conviction. There, as here, "none of the witnesses produced could agree on its dominant theme." 54 Cal. Rptr. at 182. The pictures here and in *Landau* are also similar because they are both by men whose other works have some value—"Un Chant d'Amour" was by Jean Genet, "Blue Movie" by Andy Warhol. But as the California court rejected Genet's prominence as a factor, noting, "the artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture in the fields covered by the film" and that "great artists can create the type of hard core pornography proscribed" [*Landau* v. *Fording*, 54 Cal. Rptr. at 182], so did the trial court here reject Warhol's. The trial court found "that the motion picture in question is hard core pornography" (215). See *People* v. *Richmond County News*, 9 N.Y.2d 578 (1961); *People* v. *G.I. Distributors*, 20 N.Y.2d 104 (1967).

Petitioner relies upon *Stanley* v. *Georgia*, 394 U.S. 557 (1969), apparently on the theory that since adults could possess obscenity in their own home, he could display the movie. That argument has been rejected in *United States* v. *Reidel*, 402 U.S. 351 (1971).

Petitioner never challenged the findings that he "promoted" the film or that he knew its contents. Accordingly, his guilt of obscenity was established and the state court's finding on this issue presents no question worthy of review.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
Assistant District Attorneys
Of Counsel

April, 1972

To Be Argued By
IRVING ANOLIK

IN THE

Supreme Court of the United States

October Term 1972

No. 72-[illegible]

Supreme Court, U.S.
FILED
[illegible]
MICHAEL RODAK, JR., CLERK

SAUL [illegible],

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals, State of New York
Petition for Certiorari Filed [illegible]
Certiorari granted [illegible]

BRIEF FOR PETITIONER

IRVING ANOLIK, ESQ.
[illegible]
Attorneys for Petitioner
[illegible] Broadway
New York, New York 10007
[illegible]

[illegible] ANOLIK
Of Counsel

[illegible] APPELLATE PRINTERS, INC.
[illegible]

FILE COPY

To be argued by
IRVING ANOLIK

In The

Supreme Court of the United States

October Term 1972

No. 71-1043

Supreme Court, U. S.
FILED
JUL 14 1972
MICHAEL RODAK, JR., CL

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals, State of New York
Petition for Certiorari filed March 1, 1972
Certiorari granted May 15, 1972

BRIEF FOR PETITIONER

IRVING ANOLIK and
JOEL H. WEINBERG
Attorneys for Petitioner
225 Broadway
New York, New York 10007
732-3050

IRVING ANOLIK
Of counsel

(5096)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

[illegible]
[illegible] rights such
as [illegible] motion picture film is not a
question of discretion, but is a matter
of fundamental constitutional rights.
The petitioner clearly was entitled,
as a matter of constitutional law, to

TABLE OF CONTENTS

Page

Statement 1

Opinions Below 2

Jurisdiction 2

The Questions Presented for Review 2

Constitutional and Statutes Involved 3

The Facts 4

Argument:

Point I. The United States Court of Appeals for the Second Circuit expressly declared that no movie film could be seized without affording a prior adversary hearing. Despite this explicit injunction, the New York Court of Appeals nevertheless upheld a seizure effected sans a prior adversary hearing. This violated the supremacy clause of the Constitution as well as the First and Fourth Amendments. 6

Point II. A prior adversary hearing involving First Amendment rights such as a moving picture film is not a question of discretion, but is a matter of fundamental constitutional rights. The petitioner herein was entitled, as a matter of constitutional law, to

Page

a prior adversary hearing before the seizure of "Blue Movie" was effectuated. 10

Point III. The seizure and suppression of the motion picture film herein without a prior adversary hearing to determine its alleged obscenity, constituted a prior restraint on the exercise of freedom of expression in violation of the First, Fourth and Fourteenth Amendments and of decisional law interpretive thereof. 12

Point IV. The film in question, "Blue Movie," is not obscene and should not have been banned since there was no claim of "pandering" or "exploitation of its sexual content." 19

Conclusion 21

Table of Citations

CASES CITED:

Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970) 3, 7, 8

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 14

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied 397 U.S. 920 . . . . 3, 7, 8, 16, 17, 18, 19

Contents

Page

Boddie v. Connecticut, 91 S. Ct. 780, 785-786 14

Cain v. Kentucky, 397 U.S. 319 20

Cambist Films, Inc. v. Duggan, 420 F.2d 687 (3 Cir. 1969) 16

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 14

Castle v. Hayes Freight, (1954), 3484 S. 61, 99 L. Ed. 68 8

Demich, Inc. v. Ferdon, 426 F.2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223 16

Freedman v. Maryland, 380 U.S. 51, 57. 14

Gibbons v. Ogden (1824), 9 Wheat. 1, 6 L. Ed. 23 8

Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D. N.Y. 1969) 19

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed.2d 1469 (1957) 19

Lee v. Florida, 392 U.S. 378 9

Mapp v. Ohio, 367 U.S. 643 9

Marcus v. Search Warrants of Property, 367 U.S. 717, 731, 736 . . . . 12, 15

Contents

Page

McDermott v. Wisconsin (1913) 228 U.S. 115, 132, 57 L. Ed. 754 8

Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968) 16, 18

Miranda v. Arizona, 384 U.S. 436 9

New York Times Co. v. United States, 91 S. Ct. 2140, 2143 13

Quantity of Copies of Books v. Kansas, 378 U.S. 205 16

Rabe v. Washington, (No. 71-247, October Term, 1971) 11

Redrup v. New York, 386 U.S. 767 20

Roth v. United States, 354 U.S. 476 3

Sniadach v. Family Finance Corp., 395 U.S. 337 13

Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969) 19

Speiser v. Randall, 357 U.S. 513, 525 12

Stanley v. Georgia, 394 U.S. 557 21

208 Cinema, Inc. v. Vergari, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ___ F.2d ___ (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934 16

Contents

Page

Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985 . . . . 16, 18

United States v. Alexander, 428 F.2d 1169, 1176 (8 Cir. 1970) 16, 18

Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied sub nom. Turner v. Wilhelm, 91 S. Ct. 919 (March 1, 1971) 16

UNITED STATES CONSTITUTION CITED:

Art. VI, par. 2 . . . . 3, 8

First Amendment 3, 11, 14, 15, 21

Fourth Amendment 3, 11, 21

Fourteenth Amendment 3, 11, 15, 21

STATUTES CITED:

28 U.S.C., Sec. 1257(3) 2

New York Penal Law 8235.05 3

Continued

Page

Tyrone, Inc. v. Wilkinson, 410 F.2d 639, 641 (4 Cir. 1969), cert. denied [illegible] U.S. [illegible] (1970) [illegible]

United States v. Alexander, [illegible] F.2d [illegible] (6 Cir. 1970) [illegible]

Wilhelm v. Turner, 431 F.2d 177 (4 Cir. 1970), cert. denied sub nom. Turner v. Wilhelm, 91 S. Ct. 919 (March 1, 1971) [illegible]

UNITED STATES CONSTITUTION CITED

Art. VI, cl. 2 [illegible]

First Amendment [illegible]

Fourth Amendment [illegible]

Fourteenth Amendment [illegible]

STATUTES CITED

28 U.S.C. Sec. 1257(3) [illegible]

New York Penal Law [illegible]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972
NO. 71-1043

- -x

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- -x

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK. PETITION FOR CERTIORARI FILED MARCH 1, 1972. PETITION FOR CERTIORARI GRANTED MAY 15, 1972.

Statement

Petitioner, Saul Heller, submits this brief in connection with the Writ of Certiorari which was granted by this Court on the 15th day of May, 1972. The petitioner is seeking a reversal of a judgment of conviction charging him with violating Section 235.05 of the New York Penal Law (obscenity in the portrayal of a motion picture — "Blue Movie").

Statement

The petitioner herein is an attorney at law and was sentenced to pay a fine of $250.00 or to serve 30 days in jail. The fine has been paid (162a).

Opinions Below

The Appellate Term of the Supreme Court of the State of New York affirmed the judgment of conviction, one Judge dissenting in an opinion. That opinion is reproduced at page 179a of the Appendix. The New York Court of Appeals likewise affirmed the judgment of conviction with two judges dissenting and that opinion appears at 181a of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3).

The Questions Presented for Review

1. Whether a movie film may ever be seized without a prior adversary hearing?

2. Whether a State Court (New York Court of Appeals) may blatantly disobey a ruling of the United States Court of Appeals by refusing to order an adversary hearing prior to the seizure of a movie film, in view of the determination by the United States Court of Appeals, Second Circuit, that such an adversary hearing is required?

3. A movie film entitled "Blue Movie," restricted to audiences over the age of 18 years, was seized without a prior adversary hearing having been afforded to the petitioner. Since the United States Court of Appeals for the Second Circuit ruled that a prior adversary hearing must be granted in such cases, did the New York Court of Appeals violate the supremacy clause of the United States Constitution, as well as the First and Fourteenth Amendments thereof, by holding that the courts of the State of New York need not grant prior adversary hearings in such cases? (Bethview Amusement Corp. v. Cahn, 416 F.2d 410 [1969], cert. denied 397 U.S. 920; Astro Cinema Corp. v. Mackell, 422 F.2d 293 [1970]).

4. Whether the film here in question, "Blue Movie," was in fact obscene within the purview of Roth v. United States, 354 U.S. 476, in view of the facts that there was no pandering or solicitation, and no one under the age of 18 was permitted to buy a ticket or to see the film?

Constitutional and Statutes Involved

The First, Fourth and Fourteenth Amendments and Article VI, paragraph 2 of the Constitution, as well as N.Y. Penal Law 8235.05 are involved.

The Facts

The factual situation is not of paramount importance. The petitioner was manager of the Garrick Theatre on Bleeker Street in Greenwich Village which, on July 29, 1969, was showing a movie called "A Blue Movie." There is no doubt but that absolutely no one under the age of 18 years was permitted into the theatre and that there was no pandering or solicitation for patrons to enter the theatre.

On July 31, 1969, a criminal court judge, Honorable Arthur H. Goldberg, at the request of Assistant District Attorney Beckler, went to this theatre and viewed the movie between 3:40 p.m. and 5:20 p.m.

This viewing was precipitated by an earlier attendance at the theatre by two police officers on July 29, 1969, namely Deputy Inspector Charles Smyth and Lieutenant Sullivan (Smyth, 20a-26a, 33a; Goldberg, 10-17a).*

Immediately after the showing of the movie, without any notice to the petitioner, and without any adversary hearing, the Judge signed a search warrant right outside of the theatre ordering the seizure of the film and also executed three arrest warrants because

---

*Numerals in parentheses refer to pages of the Appendix.

> "It was and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg, 10a-13a, 16a-17a).

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. All of the judges in the courts below viewed the film and, in each instance, the movie was ruled obscene although there were dissents, namely two judges, including the Chief Judge and an associate judge, in the Court of Appeals, and one justice in the Appellate Term of the Supreme Court.

It is not relevant to this petition to go into all of the facts beyond this since this recitation crystallizes the issues. There were differences of opinion as to whether or not the movie was or was not obscene. This is one major issue raised in this Court. Perhaps a more important issue, however, is whether or not an adversary hearing should have been held prior to the issuance of the search warrant since there was no emergency nor was there any danger to the community. A seizure of this film effectively precluded further showings since there were no other prints readily available, and the threat of imminent arrest lurked in prospect for any personnel causing a display of the film.

THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE IS PROPERLY BEFORE THIS COURT.

The Facts

The respondent has previously conceded that the petitioner properly preserved the issue of unlawful search and seizure and was anxious for the return of the film which had been seized. The respondent, in the Court below, in its brief on page 20, admitted:

> "It appears therefore that in the unusual circumstances here, the issue of the seizure was preserved for review."

In this Court, respondent consented to Certiorari.

There is, therefore, no dispute between the parties hereto about the jurisdiction of this Court to review the issues being raised, namely whether or not a seizure of the film was justified without an adversary hearing having been held, and whether or not the prosecution was justified in retaining the film, as it still does.

Argument

Point I

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT EXPRESSLY DECLARED THAT NO MOVIE FILM COULD BE SEIZED WITHOUT AFFORDING A PRIOR ADVERSARY HEARING. DESPITE THIS EXPLICIT INJUNCTION, THE NEW YORK COURT OF APPEALS NEVERTHELESS UPHELD A SEIZURE EFFECTED SANS A PRIOR ADVERSARY HEAR-

ING. THIS VIOLATED THE SUPREMACY CLAUSE OF THE CONSTITUTION AS WELL AS THE FIRST AND FOURTH AMENDMENTS.

In the case at bar there is no serious dispute concerning the facts. There is no question but that the movie in question herein, "Blue Movie," was seized by the State authorities without affording the petitioner or the owner of the film, or anyone else for that matter, a prior adversary hearing. A judge, Honorable Arthur Goldberg of the Criminal Court of the City of New York, viewed the film and made an ex parte determination that it was obscene. Predicated upon this, he signed a search warrant authorizing the seizure of the film which turned out to be one of the few, if not the only, prints available. He also ordered the forthwith arrest of petitioner.

As explained earlier in this brief, the respondent concedes that the issue of search and seizure is properly before this Tribunal.

The Courts in New York were told about the decisions of the United States Court of Appeals on the issue of affording prior adversary hearings in cases similar to that presented herein. It can only be presumed therefore that the Courts of New York State deliberately and intentionally chose to violate the ruling of the United States Court of Appeals for the Second Circuit (Bethview Amusement Corp. v. Cahn, supra; Astro Cinema Corp. v. Mackell, supra (172a, 173a).

It is submitted that this squarely presented an issue affecting the supremacy clause of the Constitution of the United States. (Gibbons v. Ogden [1824] 9 Wheat. 1, 6 L. Ed. 23; McDermott v. Wisconsin [1913] 228 U.S. 115, 132, 57 L. Ed. 754; Castle v. Hayes Freight, [1954] 3484 S. 61, 99 L. Ed. 68.) Presumably, Federal law and decisions interpreting Federal Law constitute the supreme law of the land. This factor was obviously of no moment to any of the courts in New York.

In both the Astro Cinema Corp. and the Bethview cases, the Second Circuit specifically declared that adversary hearings were required before warrants could be issued for the seizure of a movie film.

In rejecting this view, the New York Court of Appeals' majority declared, inter alia:

> "...The decisions of the Second Circuit in Astro Cinema Corp. v. Mackell ... and Bethview Amusement Corp. v. Cahn ..., requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court."

The supremacy clause of the United States Constitution, Article VI, paragraph 2, requires that State courts defer to Federal courts in such conflicts (Gibbons v. Ogden, supra.)

The Constitution of the United States, Article VI, paragraph 2, unequivocally declares:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Emphasis supplied.)

In such other cases as Mapp v. Ohio, 367 U.S. 643 and Miranda v. Arizona, 384 U.S. 436, this Court has pre-empted State courts' decisions in the area of search and seizure and confessions respectively, and has directed that where inconsistent with the determinations of this Court, the State courts must change their determinations. This is also exemplified by the decision in Lee v. Florida, 392 U.S. 378.

The issue, therefore, in the case at bar, is very clearly framed since it is manifest that where the State of New York's highest Court deliberately refuses to obey a determination of the United States Court of Appeals, that a serious jurisdictional conflict is presented which should be resolved by this Court. This is especially so where the State's highest Court declares that it is obeying the policies of the United States Supreme Court in its refusal to obey the determinations of the United States Court of Appeals.

If this Court fails to resolve this conflict, litigants will obtain one result in the Federal Court of Appeals, but a different result in the

New York State courts. This would be an intolerable situation.

It is respectfully submitted that the United States Court of Appeals is correct and that the First Amendment as well as the Fourteenth Amenment requires that prior adversary hearings be granted before a movie film is seized.

In the case at bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available (158a, 159a).

Even if that were not the case, however, the risk of criminal prosecution and further seizure would be adequate deterrents. In addition, the petitioner, as well as the owners of the film, have suffered tremendous economic loss.

We submit that the respondent is probably just as anxious to resolve this dilemma.

Point II

A PRIOR ADVERSARY HEARING INVOLVING FIRST AMENDMENT RIGHTS SUCH AS A MOVING PICTURE FILM IS NOT A QUESTION OF DISCRETION, BUT IS A MATTER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS. THE PETITIONER HEREIN WAS ENTITLED, AS A MATTER OF CONSTITUTIONAL LAW, TO A PRIOR ADVERSARY HEARING BEFORE THE SEIZURE OF "BLUE MOVIE" WAS EFFECTUATED.

This Court has not specifically passed upon the issue herein, but it is submitted that the inescapable conclusion that one must reach is that the First, Fourth and Fourteenth Amendments prohibited the seizure of a movie film without affording a prior adversary hearing.

There can be no doubt that the movie film herein was displayed in a theatre which was completely enclosed and the film could not be viewed by any member of the public unless a ticket was purchased at a substantial price and entry was thus obtained to the auditorium. Accordingly, the unusual situation presented in Rabe v. Washington, (No. 71-247, October Term 1971), is not extant herein. It is not disputed that no one under the age of 18 years was permitted to purchase a ticket and there was no pandering or solicitation of the public whereby anyone was enticed or proselytized into buying a ticket to see the movie.

Judge Goldberg of the Criminal Court of the City of New York apparently viewed this film but his testimony indicated that he was not particularly excited. On the contrary, he was bored by it. He came to view the film in the role of a censor, and immediately after seeing it, signed a search warrant authorizing the seizure of the film.

The petitioner was likewise arrested in this summary fashion, on the same day as the seizure.

The courts in New York were split on the issue of whether or not the film was or was not obscene although the majority in each instance ruled in favor of a finding of obscenity. We of course do not believe the film is obscene at all although this aspect is discussed infra.

Point III

THE SEIZURE AND SUPPRESSION OF THE MOTION PICTURE FILM HEREIN WITHOUT A PRIOR ADVERSARY HEARING TO DETERMINE ITS ALLEGED OBSCENITY, CONSTITUTED A PRIOR RESTRAINT ON THE EXERCISE OF FREEDOM OF EXPRESSION IN VIOLATION OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS AND OF DECISIONAL LAW INTERPRETIVE THEREOF.

The guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. The Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. Marcus v. Search Warrants of Property, 367 U.S. 717, 731; Speiser v. Randall, 357 U.S. 513, 525.

Argument

It is submitted that one of the fundamental precepts of due process is that an individual is guaranteed a right to notice and hearing before he may be deprived of any significant property interest. Ex parte restraints are particularly abominable. While a motion picture film may not appeal to everybody, it is nevertheless clear that it is a means of communication and a form of expression within the purview of the First Amendment. All media of communication must be left free if we are to have a free press and free speech in this nation. There must be no censorship, injunctions, or prior restraints upon the media of communication. (See Justice Black concurring in New York Times Co. v. United States, 91 S. Ct. 2140, 2143.)

It is generally accepted as fundamental to procedural due process that a person be afforded "notice and an opportunity to be heard" before he may be deprived of life, liberty or property. The mainstream of the procedural due process decisions of the courts is the recognition that the most fundamental ingredient of the due process guarantee is "a meaningful opportunity to be heard." Thus, while it is customary today to begin discussion of this principle with Sniadach v. Family Finance Corp., 395 U.S. 337, it is important to emphasize that the Sniadach opinion did not establish a new constitutional rule, but simply brought traditional procedural due process analysis, worked out over many decades of constitutional litigation, to bear upon the question at issue in the case. "Early in our jurisprudence" it was held that "due process of law signifies a right to be heard in one's defense" Boddie v. Connecticut, 91 S. Ct. 780, 785-786.

More than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case, the public's right to know, the public's right to hear, the public's right to view, is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected.

It follows therefore that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70; Freedman v. Maryland, 380 U.S. 51, 57. Thus, in Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, the Court held that the issuance of a ten day injunction restraining members of a political party from holding rallies was incompatible with the freedom of speech provisions of the First Amendment. The Court stated that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate" 393 U.S. at 180. The Court added the following salient observations:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte,

> because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication" 393 U.S. at 183.

With respect to the ex parte seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed, have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression, without a prior adversary hearing to determine the alleged obscenity of the particular communication seized, constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First and Fourteenth Amendments. In Marcus v. Search Warrants of Property, 367 U.S. 717, 736, the Court observed that no prior decision of the

Court supported the proposition that a State could impose extensive restraints on the distribution of publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material was legally obscene. In Quantity of Copies of Books v. Kansas, 378 U.S. 205, the Court concluded "that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient" 378 U.S. at 211.

The Books ruling was followed in Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; 208 Cinema, Inc. v. Vergari, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ___ F.2d ___ (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934; United States v. Alexander, 428 F.2d 1169 (8 Cir. 1970); Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied sub nom. Turner v. Wilhelm, 91 S. Ct. 919 (March 1, 1971); Cambist Films, Inc. v. Duggan, 420 F.2d 687 (3 Cir. 1969); Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Demich, Inc. v. Ferdon, 426 F.2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

At least six courts of appeals as aforestated, and many district courts, have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed access to non-obscene expression. A distilation of the views expressed by the courts indicates a firm belief that a prior adversary hearing, rather than an ex parte proceeding, is essential in cases involving alleged obscenity. An adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and makes certain that seizure or injunction will be limited only to those items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

The First Amendment does not require that an adversary hearing turn on the question of whether there has been a "massive" seizure of allegedly obscene material. Certainly a theatre housing 200 seats, such as in the cast at bar, where one of the detectives (Smyth) declared that on at least two occasions 100 of those seats were filled during the screening of the film, a great potential audience exists who may ultimately view the movie. To equate a print of a film with a single book, therefore, would be ludicrous.

In Bethview Amusement Corp., supra, the Court of Appeals made it quite plain that the seizure of a film is far more significant than the seizure of a single book. Thus the Court explained:

> "Appellants argue that there is a difference between the seizure of a large number of

books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated" (Bethview, supra, 416 F.2d at 412).

In United States v. Alexander, 428 F.2d 1169 (8 Cir. 1970), the Court of Appeals declared that it is a casuistic line of reasoning to argue that purveyors or dealers in obscenity will be immunized from prosecution if prior adversary hearings are required. Thus in United States v. Alexander, supra, (id. at 1176), the Court explained:

> "It is frequently suggested, and the Government so argues, that dealers in obscenity will be effectively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for the securing of evidence remain available to prosecutors. See, e.g., Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Tyrone, Inc. v. Wilkinson,

410 F.2d 639 (4th Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969); Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D. N.Y. 1969). See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed.2d 1469 (1957). We believe these cases answer the Government's concern."

Point IV

THE FILM IN QUESTION, "BLUE MOVIE," IS NOT OBSCENE AND SHOULD NOT HAVE BEEN BANNED SINCE THERE WAS NO CLAIM OF "PANDERING" OR "EXPLOITATION OF ITS SEXUAL CONTENT."

In the Appellate Term of the Supreme Court of the State of New York, Justice Markowitz dissented and voted to reverse the judgment of conviction on the grounds that the film was not obscene and because of his very incisive recognition that "sex and obscenity are not synonymous" (179a).

He further recognized, as have many other courts, that there are very dim and uncertain lines between what one person may consider obscene, and what another may consider obscene.

Even in the case at bar, the presiding Judge at the trial indicated how vague and nebulous the theory of obscenity really is (33a):

> "The Presiding Judge: Yes. I might point out to you, Counselor, that there is a wide diversity of opinion throughout the country, including the federal courts, on this very issue. Now, there are some cases that have held that it is part of the People's case to establish what the so-called [41] community standards are. There are other cases which hold that that is not a part of the People's case. There are some cases that hold that expert testimony as to what community standards are, should be introduced. There are other cases that hold to the contrary.
>
> The Defendant's Counsel: Agreed, Your Honor.
>
> The Presiding Judge: And even Redrup, which you cite as a leading case, the judges split four different ways, they couldn't agree on an opinion, all they could agree was that the case should be reversed."

The dissent of Chief Judge Fuld of the New York Court of Appeals in which another judge concurred, indicated that he, too, found that the movie was not obscene (185a, 186a).

(See Cain v. Kentucky, 397 U.S. 319; and, Redrup v. New York, 386 U.S. 767.)

The movie does not show any perverted acts of contacts between the actors and there are numerous films now being shown which are far more explicit than anything shown in the "Blue Movie."

Since Stanley v. Georgia, 394 U.S. 557, prohibits seizure of any film used for private recreation of a non-commercial nature, we maintain that it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it. Why ought any adult be deprived of the right to see any form of entertainment which does not cause any clear and present danger to society?

The suppression of a movie such as the one herein, banal perhaps, but certainly not a threat to law and order, smacks of "thought control" and is a clear violation of the First, Fourth and Fourteenth Amendments. This Court should once and for all put an end to the selective suppression of material within the First Amendment's purview.

Conclusion

The Judgment of Conviction should be reversed and the information dismissed.

Respectfully submitted,

IRVING ANOLIK and
JOEL H. WEINBERG
Attorneys for Petitioner

IRVING ANOLIK
Of Counsel.

LE COPY

Court, U. S.
FILED
OCT 5 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

October Term, 1972

No. 71-1043

Saul Heller, *Petitioner*

vs.

The People of the State of New York, *Respondent*

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE

Evelle J. Younger,
Attorney General of the State of California,
Edward A. Hinz, Jr.,
Chief Assistant Attorney General—
Criminal Division,
Doris H. Maier,
Assistant Attorney General—Writs Section,
Edward P. O'Brien,
Assistant Attorney General,
Robert R. Granucci,
Deputy Attorney General,
Clifford K. Thompson, Jr.,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-0204,

Attorneys for Amicus Curiae.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

Page

Interest of amicus curiae 1

Summary of argument 3

Argument 4

A magistrate's scrutiny of a detailed factual affidavit is sufficient judicial review to authorize the seizure for evidentiary purposes of a single copy of an obscene motion picture film 4

A. California procedure 4

B. Necessity for an ex parte judicial hearing procedure 7

C. Analysis of decisions requiring prior adversary hearings 10

Conclusion 14

Table of Authorities Cited

Cases

Pages

A quantity of Books v. Kansas, 378 U.S. 205 (1964) 4, 5, 10, 11, 12

Aday v. Municipal Court, 210 Cal.App.2d 229, 26 Cal. Rptr. 576 (1962) 6

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969) 1, 2, 13

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 4, 11

Cambist Films Inc. v. Duggan, 420 F.2d 687 (3d Cir. 1969) 2, 10, 13

Commonwealth v. State Amusement Corp., 248 N.E.2d 497 (Mass. 1969) 2

Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662 (E.D. La. 1969) 8

Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970), judgment vacated, 401 U.S. 990 (1971) 1, 2, 8

Pages

Freedman v. Maryland, 380 U.S. 51 (1965) 5

Huffman v. United States, ___ F.2d ___ (D.C. Cir. October 7, 1971) 2

In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968) 13

Landau v. Fording, 245 Cal.App.2d 820, 53 Cal.Rptr. 872 (1966) 4
Lee Art Theater, Inc. v. Virginia, 392 U.S. 636 (1968) 7, 9, 12, 14

Marcus v. Search Warrant, 367 U.S. 717 (1961) 4, 10, 11
Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968) ..2, 10, 11, 12, 13
Miller v. United States, 431 F.2d 655 (9th Cir. 1970) 2
Mishkin v. New York, 383 U.S. 502 (1966) 12
Monica Theater v. Municipal Court, 9 Cal.App. 7, 88 Cal. Rptr. 71 (1970) 1, 6

People v. DeRenzy, 275 Cal.App.2d 380, 79 Cal.Rptr. 777 (1969) 1, 5, 7, 8, 9
People v. Heller, 29 N.Y.2d 319, 327 N.Y.S.2d 678 (1971) 1
People v. Johnson, 185 N.W.2d 150 (Mich. Ct. App. 1970) 2
People v. Luros, 4 Cal.3d 84, 92 Cal.Rptr. 833 (1971) 6
People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967) 6
People v. Steinberg, 60 Misc. 1041, 304 N.Y.S.2d 858 (Westchester Cty. 1969) 7

Rage Books, Inc. v. Leary, 301 F.Supp. 546 (S.D.N.Y. 1969) 7
Roth v. United States, 354 U.S. 576 (1957) 4

South Florida Art Theaters, Inc. v. State ex rel. Mounts, 224 So.2d 706 (Fla.App.Ct. 1969) 2
State v. Albini, 285 N.E.2d 327 (Ohio 1972) 2, 9
State v. Eros Cinema, Inc., 264 So.2d 615 (La. 1972) 2
State v. Hartstein, 469 S.W.2d 329 (Mo. 1971) 2
State v. Osborne, 285 A.2d 43 (N.J. Super.Ct. 1971) 2
State v. Rabe, 79 Wash.2d 254, 484 P.2d 917 (1971) 2

Times Film Corp. v. Chicago, 365 U.S. 43 (1961) 4
Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) ..2, 8, 13

United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970) 2, 10, 13

Pages
United States v. Cangiano, ___ F.2d ___ (2d Cir. June 26, 1972) 2, 14
United States v. Wild, 422 F.2d 34 (2d Cir. 1969) 2, 12

Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963) 6

Codes

Penal Code:
    Section 1538.5(a) 6
    Section 1539 6
    Section 1540 6

Constitutions

United States Constitution:
    First Amendment 3, 8, 13
    Fourth Amendment 14
    Fifth Amendment 3

[illegible]

Landau v. Fording, 245 Cal.App.2d 820, 54 Cal.Rptr. 177 (1966) [illegible]

Lee Art Theater, Inc. v. Virginia, 392 U.S. 636 (1968) [illegible]

Marcus v. Search Warrant, 367 U.S. 717 (1961) [illegible]

Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968) [illegible]

Miller v. United States, 431 F.2d 655 (9th Cir. 1970) [illegible]

Mishkin v. New York, 383 U.S. 502 (1966) [illegible]

[illegible] Theater v. [illegible] (1970) [illegible]

[illegible] v. [illegible] (1969) [illegible]

People v. Heller, 29 N.Y.2d 319, [illegible] (1971) [illegible]

People v. Johnson, [illegible] (1970) [illegible]

People v. [illegible], 3 Cal.3d [illegible] (1971) [illegible]

People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967) [illegible]

People v. [illegible], 60 Misc. [illegible] (1969) [illegible]

Rage Books, Inc. v. Leary, 301 F.Supp. 546 (S.D.N.Y. 1969) [illegible]

Roth v. United States, 354 U.S. 476 (1957) [illegible]

South Florida Art Theaters, Inc. v. State ex rel. Mounts, 224 So.2d 706 (Fla.App. 1969) [illegible]

State v. Aiken, [illegible] (Ohio 1968) [illegible]

State v. [illegible], Inc., [illegible] (1971) [illegible]

State v. [illegible] (1971) [illegible]

State v. [illegible], [illegible] A.2d [illegible] (N.J. Super.Ct. 1971) [illegible]

State v. [illegible] (1971) [illegible]

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) [illegible]

Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) [illegible]

United States v. Alexander, 428 F.2d [illegible] (8th Cir. 1970) [illegible]

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1043

SAUL HELLER, *Petitioner*
vs.
THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Whether a prior adversary hearing must precede the seizure of a single copy of an obscene motion picture film is a question as sharply dividing state and federal courts in California as in New York. *Contrast People v. DeRenzy,* 275 Cal.App.2d 380, 79 Cal. Rptr. 777 (1969), and *Monica Theater v. Municipal Court,* 9 Cal.App. 7, 88 Cal. Rptr. 71 (1970), *with Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *judgment vacated,* 401 U.S. 990 (1971), and *contrast People v. Heller,* 29 N.Y.2d 319, 327 N.Y.S.2d 678 (1971), *with Bethview Amusement Corp. v. Cahn,* 416 F.2d 410 (2d Cir. 1969).

California courts, like those of New York and many other states hold that a prior adversary hearing is not constitutionally required. *State v. Rabe,* 79 Wash. 2d 254, 484 P.2d 917 (1971); *South Florida Art Theaters, Inc. v. State ex rel. Mounts,* 224 So. 2d 706 (Fla. App. Ct. 1969); *Commonwealth v. State Amusement Corp.,* 248 N.E.2d 497 (Mass. 1969); *State v. Hartstein,* 469 S.W.2d 329 (Mo. 1971); *State v. Albini,* 285 N.E.2d 327 (Ohio 1972); *State v. Eros Cinema, Inc.,* 264 So.2d 615 (La. 1972); *People v. Johnson,* 185 N.W.2d 150 (Mich. Ct. App. 1970); *State v. Osborne,* 285 A.2d 43 (N.J. Super. Ct. 1971).

Federal appellate courts generally disagree. *Bethview Amusement Corp. v. Cahn, supra; Cambist Films Inc. v. Duggan,* 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy,* 393 F.2d 202 (7th Cir. 1968); *United States v. Alexander,* 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc. v. Ferdon, supra. Contra, Huffman v. United States,* ...... F.2d ...... (D.C. Cir. October 7, 1971); *United States v. Wild,* 422 F.2d 34 (2d Cir. 1969). *And cf. United States v. Cangiano,* ...... F.2d ...... (2d Cir. June 26, 1972); *Miller v. United States,* 431 F.2d 655 (9th Cir. 1970). Upon the resolution of this dispute depends the effective enforcement of state criminal obscenity laws.

Our state courts sanction a procedure different from that followed by New York authorities in this case. In California, after scrutinizing a detailed factual affidavit describing its content, a magistrate may issue a warrant authorizing seizure of a single copy of a film for use as evidence in a criminal prosecution.

Pursuant to the New York procedure under review a magistrate viewed the seized film at the theater. Our interest in upholding California's ex parte warrant procedure against the contentions that an adversary hearing must precede seizure or that the magistrate must view the film before authorizing seizure brings us before this Honorable Court as *amicus curiae.*

SUMMARY OF ARGUMENT

A magistrate's examination of a detailed factual affidavit describing content is sufficient judicial review to authorize the seizure of a single copy of an allegedly obscene motion picture film for evidentiary use in a criminal prosecution. This ex parte warrant procedure is especially appropriate where, as in California, a prompt adversary judicial proceeding is available immediately following seizure.

The prior adversary hearing requirement imposed by some federal appellate courts prevents effective enforcement of state criminal obscenity laws. If, under the First and Fifth Amendments, an exhibitor may be ordered to produce an obscene film for a prior hearing or for trial, there exists no adequate guarantee of compliance with such order. Prior adversary hearings will seriously deplete judicial resources.

California's ex parte warrant procedure is a constitutional alternative to the New York procedure under review, wherein a magistrate views a film before authorizing its seizure. If the Constitution demands that judges watch dirty movies, it does not require them to pay for the privilege.

ARGUMENT

A MAGISTRATE'S SCRUTINY OF A DETAILED FACTUAL AFFIDAVIT IS SUFFICIENT JUDICIAL REVIEW TO AUTHORIZE THE SEIZURE FOR EVIDENTIARY PURPOSES OF A SINGLE COPY OF AN OBSCENE MOTION PICTURE FILM.

A. California Procedure

Nonobscene movies, like books, are protected expression. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952); *Roth v. United States,* 354 U.S. 576, 581-85 (1957); *Landau v. Fording,* 245 Cal.App. 2d 820, 53 Cal. Rptr. 872 (1966). To insure adequate protection of nonobscene *literature,* this Court has ruled that an adversary hearing on the issue of obscenity must precede the seizure under warrant of *quantities* of books alleged obscene. *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964) (plurality opinion); *Marcus v. Search Warrant,* 367 U.S. 717 (1961).

However, this Court has never overlooked the practical differences between books and films, and has never equated the two forms of communication.

> "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Joseph Burstyn, Inc. v. Wilson, supra,* 503, quoted in *Times Film Corp. v. Chicago,* 365 U.S. 43, 49 (1961).

More recently, this Court reiterated that "films differ from other forms of expression." *Freedman v. Maryland,* 380 U.S. 51, 61 (1965). Because it is far more difficult for a magistrate to arrange or attend a film showing than to read a copy of a book obtained by the police, the procedures set forth in *Quantity of Books* do not apply to films.

Amicus contends that a magistrate's scrutiny of a detailed factual affidavit is sufficient judicial review to authorize the seizure for evidentiary purposes of a single copy of an allegedly obscene motion picture film. A corollary of our rule is that if an exhibitor possesses several copies of a single film, the police may seize but one; the exhibitor may, at the risk of violating state law, continue to screen the remaining copies. The purpose of the seizure is not to suppress free expression, but to preserve evidence necessary to convict those who violate state obscenity laws.

> "We believe this . . . [rule] to be a reasonable accommodation of the constitutional right of California to enforce a constitutionally valid criminal statute to the demands of the federal Bill of Rights. As required . . . it is 'designed to focus searchingly on the question of obscenity,' and it authorizes a restrictive procedure reasonably calculated to 'ensure against the curtailment of constitutionally protected expression.'" *People v. DeRenzy,* 275 Cal.App.2d 380, 386-387, 79 Cal. Rptr. 777, 780 (1969).

The ex parte warrant procedure is especially appropriate in California where statutory provision is made for a prompt post-seizure ruling on the legality of the seizure.

> " 'Where, as here, the seizure occurs under a warrant, an ex parte determination of the issue of obscenity, so far as probable cause is concerned, has taken place before the issuance of the warrant, and immediately after the seizure a determination of the issue to that extent can be obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code.' " *People v. Luros,* 4 Cal.3d 84, 88, 92 Cal. Rptr. 833, 835 (1971).

Under California statutes[1] "a very prompt adversary judicial proceeding can be secured." *Monica Theater v. Municipal Court, supra* 9 Cal.App.3d at 14, 88 Cal. Rptr. at 80. No delay for notice or other purpose is incurred. While the time within which the magistrate must rule is not specified, "he will be aware of the prior restraint doctrine particularly applicable to films currently being shown and of the need to rule promptly in order to be in harmony therewith and not to jeopardize his ruling." *Ibid.*

Further, if the exhibitor does not prevail on the question of probable cause, he is entitled to a pretrial judicial determination of obscenity *vel non. People v. Noroff,* 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967); *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 31 Cal. Rptr. 800 (1963); *Monica Theater v. Municipal Court,* 9 Cal.App.3d 7, 9 n.7, 88 Cal. Rptr. 71, 76 n.7 (1970); *Aday v. Municipal Court,* 210 Cal.App.2d 229, 26 Cal. Rptr. 576 (1962).

---

[1] If the owner or exhibitor is prosecuted for exhibiting the film, he may proceed at once under Penal Code section 1538.5(a). If not made a defendant, he may proceed immediately under Penal Code sections 1539 and 1540.

B. Necessity for an Ex Parte Judicial Hearing Procedure

At stake is the State's right to enforce its anti-obscenity laws against exhibitors of unprotected obscene movies. It has been widely though not universally recognized that the State cannot expect the cooperation of commercial pornographers in surrendering their films for adversary hearings. Mr. Justice Harlan, dissenting in *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636, 638 (1968), observed that any procedure other than reliance on ex parte warrants would make adjudication of obscenity in the case of movies "quite impossible." In *People v. DeRenzy, supra* at 384, 79 Cal. Rptr. at 779, our intermediate state appellate court wrote that a prior adversary hearing requirement would mean that "enforcement of a state criminal statute must necessarily rest upon some chance windfall of evidence." "[B]y the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant." *People v. Steinberg,* 60 Misc. 1041, at 1046, 304 N.Y.S.2d 858, at 863 (Westchester Cty. 1969). "It is fatuous to assume that the evidence would not ~~be~~ sold off or destroyed." *Rage Books, Inc. v. Leary,* 301 F. Supp. 546, 549, (S.D. N.Y. 1969).

Nor is there adequate guarantee that a film delivered for a prior adversary hearing will faithfully reflect what was previously exhibited. During the time elapsed between the service upon the exhibitor of a court order and production of the offending work at a hearing, the exhibitor may expurgate his film and destroy crucial portions, or splice in socially redeeming frames. Such editing occurred in a case before this Court, *Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *judgment vacated,* 401 U.S. 990 (1971).

> "There is a showing in the record . . . that the plaintiff Natali, admitted deleting portions of the film between the time it was seen by the officer and the time it was seized by the same officer. An affidavit by the officer stated that Natali deleted the most objectionable portions of the film." 426 F.2d at 647 (dissenting opinion of Carter, J.).

Some courts perceive constitutional impediments to prior adversary hearings. A California court has expressed the view that the state is powerless to produce the essential evidence at a hearing because "Any court process designed to compel production of the questioned material would obviously impinge on the possessor's Fifth Amendment rights." *People v. DeRenzy, supra* 275 Cal.App.2d at 384, 79 Cal. Rptr. at 779. *See also, Tyrone, Inc. v. Wilkinson,* 410 F.2d 639, 641 n.4 (4th Cir. 1969).

One federal court has suggested that a prior adversary hearing itself constitutes a prior restraint chilling First Amendment freedoms to the extent that "those seeking to regulate obscenity [must] devise . . . procedures . . . immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity." *Delta Book Distributors, Inc. v. Cronvich,* 304 F.Supp. 662, 667 (E.D. La. 1969).

Assuming that these practical and legal obstacles to a prior adversary hearing are overcome, other difficulties remain. The contours of such hearings being ill-defined, courts have been pressed to receive testimony from expert witnesses, evidence of community standards, and evidence of comparable works. Thus, a hearing intended to resolve a question of probable cause is expanded into a pretrial nonjury trial consuming days or weeks of court time and seriously disrupting dissemination of the questioned film. *See State v. Albini, supra,* 285 N.E.2d at 329 n.2.

Just as the prior adversary hearing procedure imposes an intolerable burden upon the prosecution, requiring a magistrate to view a film before authorizing a search warrant unnecessarily burdens the judiciary.

> "Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appears by which he may be compelled to bring his film to the magistrate." *People v. DeRenzy, supra,* 275 Cal.App.2d at 387-388, 79 Cal. Rptr. at 781.

In *Lee Art Theater,* this Court recognized the difficulties inherent in compelling judges to view motion pictures prior to issuing warrants. 392 U.S. at 637. For this reason, perhaps, the Court refrained from formulating such a rule. *Ibid.* Similarly, the Court need not and should not, in this case, invalidate California's ex parte warrant procedure by holding that the Constitution demands, alternatively, that magistrates patronize "art film" houses, or that the States not enforce their laws.

C. Analysis of Decisions Requiring Prior Adversary Hearings

In *Metzger v. Pearcy,* 393 F.2d 202 (7th Cir. 1968), the Seventh Circuit applied to movies the rule announced for books in *Quantity of Books.* "We are bound . . .," the court said, by the teaching of *Quantity of Books,* "that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity." *Metzger v. Pearcy, supra,* 204.

By this *dictum Metzger* introduced into federal jurisprudence a conceptual error perpetuated in other federal appellate opinions. The "rule" of *Metzger* was *dictum* because the police there had seized *without warrant four copies* of the film, "I, a Woman," from separate theaters. This seizure could have been condemned on the ground that there was no prior judicial determination of any kind on obscenity. Moreover, this seizure, like the mass seizures in *Marcus* and in *Quantity of Books,* was intended to suppress expression.[2]

Metzger embodies two fundamental defects, each transmitted to its progeny: a failure to distinguish between very different media of expression and the "peculiar problems" presented by each; *Joseph Burstyn, Inc. v. Wilson, supra* 343 U.S. at 503; and a failure to distinguish between a massive seizure designed to suppress a form of expression and a limited seizure of evidence necessary for a criminal prosecution.

---

[2] *Cambist Films, Inc. v. Duggan, supra,* and *United States v. Alexander, supra,* similarly involved suppression seizures.

Metzger and cases following it purported to be compelled by *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). In *Marcus* police seized 11,000 copies of 280 printed publications. 367 U.S. at 723. The officers acted upon a warrant directing seizure of "obscene material" found within designated premises. The determination of what was "obscene" was left to the police. Subsequently, a magistrate ordered the return of copies of 180 publications found not obscene. *Id.* at 724. "Mass seizure . . . was thus effected without any safeguards to protect legitimate expression." *Id.* at 738.

In *A Quantity of Books,* a magistrate, following a 45-minute examination of seven novels, issued a warrant authorizing seizure of all copies of 59 different titles. 378 U.S. at 208. Officers executing the warrant impounded 1,715 copies of 31 listed titles. *Id.* at 209.

Neither *Marcus* nor *Quantity of Books* supports much less compels the Seventh Circuit *dictum.*

> "These cases are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceed-

> ings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe *Marcus* and *Quantity of Books* can be read to proscribe the application of ordinary methods of initiating criminal prosecution to obscenity cases." *United States v. Wild,* 422 F.2d 34, 38 (2d Cir. 1969).

The essential difference between a mass or suppression seizure and an evidentiary seizure, overlooked in *Metzger* was emphasized by this Court in *Mishkin v. New York,* 383 U.S. 502, 513 (1966):

> "Finally, while the search and seizure issue has a First Amendment aspect *because* of the alleged *massive quality* of the seizures, see *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 206 (opinion of Brennan, J.); *Marcus v. Search Warrant,* 367 U.S. 717, the record in this regard is inadequate. There is neither evidence nor findings as to *how many of the total available copies* of the books *in various bookstores* were seized. . . ." (Emphasis supplied.)

In *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), decided after *Metzger,* this Court declined to apply the *Quantity of Books* procedure to films, or even to require that a magistrate view a motion picture before authorizing its seizure. *Id.* at 637. *Lee Art Theater* thus confirms that the broad language of *Metzger* was not justified by this Court's decisions.

Metzger nevertheless has been followed by federal appellate courts as consistently as it has been rejected by state courts. This divergence is not easily understood. Decisions adhering to *Metzger* fail to discuss the differences between books and films or to acknowledge openly the unacceptable consequences of prior adversary hearings. In place of critical analysis *Metzger* offers a simple doctrinal solution, perhaps irresistible in First Amendment cases. Clearly, the federal-state conflict does not arise from insensitivity to First Amendment rights on the part of California courts. *See, e.g., In re Giannini,* 69 Cal.2d 563, 72 Cal. Rptr. 655, (1968), holding topless dancing a form of protected speech.

There is a glaring internal inconsistency in *Metzger* and its offspring. The Seventh Circuit's order that the exhibitor must furnish the prosecution with a copy of the film seized cannot be reconciled with its broad language commanding adversary hearings prior to any restraint on dissemination. Other Circuit Courts have adhered to this procedure apparently intending to soften the blow to law enforcement. We do not understand how the condemned ex parte procedure more seriously disrupts dissemination than does the approved adversary proceeding. In either case the showing of the film will be halted if the exhibitor has but a single print but will not be interrupted if he has available a second copy. *Metzger, Tyrone, Bethview, Cambist,* and *Alexander* all stand for this proposition: Authorities may not seize a film without a prior adversary hearing, but they are entitled to a copy of it. We find this confusing. If the exhibitor is unable or unwilling to produce a copy of his film, he will have to deliver to the prosecution the object of the improper seizure.

The folly of this situation was highlighted recently in *United States v. Cangiano, supra.* The Second Circuit there ruled that since ex parte warrant searches infringed First, not Fourth Amendment guarantees, seized material was not inadmissible in a criminal prosecution. Moreover, the court said, the government could retain samples of seized obscenity for evidentiary use at trial. *Id.* at .... 11 Crim. L. Rptr. 2341, 2342 (1972).

This dilemma confronts the police: experience and common sense teach that exhibitors cannot be trusted to assist in their own prosecutions by furnishing copies of obscene films; federal appellate decisions teach that if the authorities make an ex parte warrant seizure either they may retain some of the fruits of their improper acquisition or the court, upon ordering the return of such material, will direct that copies be supplied to the government. This situation encourages lawless enforcement of the law.

CONCLUSION

The ex parte warrant procedure is one " 'designed to focus searchingly on the question of obscenity,' " *Lee Art Theater, Inc. v. Virginia, supra,* 392 U.S. at 637, thereby affording an adequate likelihood that nonobscene materials will reach the public. Where law enforcement officers invoke this procedure to secure a single copy of a motion picture as evidence in a criminal prosecution, there is no substantial risk of suppressing protected speech. This Court should maintain its distinction between suppression seizures and evidentiary seizures.

The California procedure is a constitutionally permissible alternative to the New York procedure. The People of the State of California, therefore, respectfully urge the Court to affirm the judgment in *Heller v. New York* without holding that a magistrate must view a film before authorizing its seizure.

Dated, San Francisco, California,
October 3, 1972.

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—
Criminal Division,
DORIS H. MAIER,
Assistant Attorney General—Writs Section,
EDWARD P. O'BRIEN,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
CLIFFORD K. THOMPSON, JR.,
Deputy Attorney General,
Attorneys for Amicus Curiae.

ILE COPY

Supreme Court
FILED
OCT 10 1972
M AK, JR.,CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1043

SAUL HELLER,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF FOR RESPONDENT

Frank S. Hogan
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

Michael R. Juviler
Lewis R. Friedman
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Questions Presented 2

Statutes Involved 2

Jurisdiction 3

Statement of the Case 3

Summary of Argument 13

Point I—The New York state courts properly applied constitutional standards in finding the film obscene 15

Point II—A judge may constitutionally issue a warrant directing the seizure of a film which he has seen in its entirety and which he has found to be obscene 26

Conclusion 45

TABLE OF AUTHORITIES

Cases:

A Quantity of Books v. Kansas, 378 U.S. 205 (1964) 30, 31, 32, 34, 35, 42
Adderly v. Florida, 385 U.S. 39 (1966) 33
Alexander v. Virginia, No. 71-1315 21
Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970) 13, 34, 35

PAGE

Bethview Amusement Corp. v. Cahn, 416 F. 2d 410 (2d Cir. 1969), *cert. denied* 397 U.S. 910 (1970) 12, 13, 32
Brinegar v. United States, 338 U.S. 160 (1949) 27
Byrne v. Karalexis, 401 U.S. 216 (1971) 31, 39

Cain v. Commonwealth, 437 S.W.2d 769 (1969), rev'd, 397 U.S. 319 (1970) 18, 19
Cambist Films v. Duggan, 420 F. 2d 687 (3d Cir. 1969) 32
Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) 37
Carroll v. United States, 267 U.S. 132 (1925) 27
Chimel v. California, 395 U.S. 752 (1969) 41
Commonwealth v. State Amusement Corp., 356 Mass. 715, 248 NE 2d 497 (1969) 32
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 26
Cox v. Louisiana, 379 U.S. 559 (1965) 33

Demich, Inc. v. Ferdon, 426 F. 2d 643 (9th Cir. 1970), rev'd on other grounds, 401 U.S. 990 (1970) 32, 36

Freedman v. Maryland, 380 U.S. 51 (1965) 35, 39, 40

Ginzberg v. United States, 383 U.S. 463 (1966) ..18, 20, 21, 22
Giordenello v. United States, 357 U.S. 480 (1958) 26

Heller v. New York, 406 U.S. 916 (1972) 3

Jacobellis v. Ohio, 378 U.S. 184 (1964) 16, 22, 23
Johnson v. United States, 333 U.S. 10 (1948) 26
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 35

Kaplan v. California, No. 71-1427 21
Karelexis v. Byrne, 306 F.Supp. 1363 (D. Mass. 1969), rev'd on other grounds, 401 U.S. 216 (1971) 18, 21
Ker v. California, 374 U.S. 23 (1963) 27
Kingsley Arms, Inc. v. Brown, 354 U.S. 436 (1954) 11, 39
Kovacs v. Cooper, 336 U.S. 77 (1949) 33

PAGE

Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd, 388 U.S. 456 (1967) 19
Lee Art Theatres, Inc. v. Virginia, 392 U.S. 363 (1968) 28, 29, 31
Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 27

MOD Amusement Corp. v. Murphy, 335 F. Supp. 1267 (S.D.N.Y. 1971), motion for stay denied, January 12, 1972 (2d Cir.) 31
Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 16
Marcus v. Search Warrant, 367 U.S. 717 (1961) 14, 27, 28, 29, 31, 34
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 16, 22
Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970) 27
Metzger v. Pearcy, 393 F. 2d 202 (7th Cir. 1968) 32
Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), aff'd *sub nom.*, New York Feed Co., Inc. v. Leary, 397 U.S. 98 (1970) 16
Mishkin v. New York, 383 U.S. 502 (1966) 20, 22, 31

Near v. Minnesota, 283 U.S. 697 (1931) 25

Overstock Book Company v. Barry, 436 F. 2d 1289 (2d Cir. 1970) 16

Paris Adult Theater I v. Slaton, No. 71-1051 21
People v. Abronovitz, 31 N.Y. 2d 160 (1972) 28, 29
People v. DeRenzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969), hearing denied by Calif. Sup. Ct. Sept. 24, 1969 27
People v. Fritch, 13 N.Y. 2d 119 (1963) 19
People v. G. I. Distributors, 20 N.Y. 2d 104 (1967) 19
People v. Heller, 29 N.Y. 2d 319 (1971) 13
People v. Luros, 4 Cal. 3rd 84, 92 Cal. Rptr. 833 (1971) 27
People v. Morgan, 68 Misc. 2d 667, 326 N.Y.S. 2d 976 (Crim. Ct. N.Y. Co. 1971), aff'd, N.Y.L.J. Jan. 18, 1972, p. 2, col. 3 (App. Term, 1st Dept.) 43

PAGE

People v. Noroff, 67 Cal. 2d 791, 63 Cal. Rptr. 575 (1967) 19
People v. Richmond County News, 9 N.Y.2d 578 (1961) 19
People v. Rothenberg, 20 N.Y.2d 35 (1967) 28, 29
People v. Shiffrin, 64 Misc. 2d 311 (Crim. Ct. N.Y. Co. 1970) 38
People v. Steinberg, 60 Misc. 2d 1041, 304 NYS2d 858 (Co. Ct. West. Co. 1969) 44

Rage Books, Inc. v. Leary, 301 F. Supp. 546 (SDNY 1969) 44
Redrup v. New York, 386 U.S. 767 (1967) 16, 19, 21
Roaden v. Kentucky, 473 SW 2d 814 (Ky. 1971), *cert. granted* 406 U.S. 905 (1972), No. 71-1134 .... 3, 32
Roth v. United States, 354 U.S. 476 (1957) .. 13, 16, 22, 23, 24

Schackman v. Annebergh, 258 F.Supp. 983 (C.D. Cal. 1966) 27
Smith v. California, 361 U.S. 147 (1959) 14, 23, 33
Stanley v. Georgia, 394 U.S. 557 (1969) 20, 21, 22, 23
State v. Albini, 31 Ohio St. 2d 27, 285 NE 2d 327 (1972) 32, 38
State v. Burgin, 255 S.C. 237, 178 SE 2d 325 (1970), rev'd on other grounds, 404 U.S. 806 (1971) 32
State v. Rabe, 79 Wash. 2d 254, 484 P.2d 917 (1970), rev'd on other grounds, 405 U.S. 313 (1972) 32
Street v. New York, 394 U.S. 576 (1969) 33

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) 39, 40
Time Film Corp. v. Chicago, 365 U.S. 43 (1961) 35
Tinker v. Des Moines School District, 393 U.S. 503 (1959) 33
Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), *cert. denied,* 396 U.S. 985 (1969) 32

PAGE

United States v. A Motion Picture Film Entitled "I Am Curious (Yellow)," 404 F.2d 196 (2d Cir. 1968) 18
United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970) 32
United States v. Lefkowitz, 285 U.S. 452 (1932) 26
United States v. O'Brien, 391 U.S. 367 (1968) 14, 32
United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970) 27
United States v. Reidel, 402 U.S. 351 (1971) 21, 22
United States v. 35mm Motion Picture Film Entitled "Language of Love," 432 F.2d 705 (2d Cir. 1970), *cert. granted sub nom.*, United States v. Unicorn Enterprises, Inc., 401 U.S. 907 (1971), *cert. denied,* 403 U.S. 925 (1971) 16, 18
United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 22, 40
United States v. Ventresca, 380 U.S. 102 (1965) 27

Wagenheimer v. Maryland State Board of Censors, 255 Md. 297, 258 A.2d 240 (1970), aff'd *sub nom.* Grove Press, Inc. v. Maryland State Board of Censors, 401 U.S. 480 (1971) 18
Warden v. Hayden, 387 U.S. 294 (1967) 27

Younger v. Harris, 401 U.S. 37 (1971) 31

Statutes and Constitution:

Acts of and Laws of the Province of Massachusetts Bay, c. CV, §8 (1712), Massachusetts Bay, Colony Charters and Laws (1814) 24

Laws of New York, 1972, chap. 826 11

N.Y.C. Criminal Court Act §40 4

N.Y. Civil Practice Law and Rules §6330 11

PAGE

N.Y. Penal Law §235.00 ... 2, 16, 17, 24

N.Y. Penal Law §235.05 ... 1, 3

N.Y. Penal Law §235.15 ... 4

28 U.S.C. §1257(3) ... 3

U.S. Constitution
  First Amendment ... Passim
  Fourth Amendment ... 14, 26, 27, 29, 30
  Fourteenth Amendment ... 26

Other Authorities:

American Law Institute, Model Code of Pre-Arraignment Procedure, Prop. Off. Draft No. 1, 1972, §SS200.6 ... 42

Commission Staff Notes, Proposed New York Penal Law, Thompson ed. (1964) ... 16

Denzer and McQuillan, Practice Commentary, N.Y. Penal Law §235.00 ... 16

Model Penal Code, Prop. Off. Draft 1962, §251.4(1) ... 16

Motion and Brief of Charles Keating, Amicus Curiae, Roaden v. Kentucky, No. 71-1134 ... 36

Note, The Prior Adversary Hearing: Solution to Procedural Due Process in Obscenity Seizure, 46 N.Y.U.L. Rev. 80 (1971) ... 27, 36

Petition for Certiorari, Lee Art Theatres, Inc. v. Virginia, 392 U.S. 362 (1968) ... 29

Report of the Commission on Obscenity and Pornography, Government Printing Office, 1970 ... 23, 24, 25

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1043

SAUL HELLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

Preliminary Statement

The writ of certiorari has been issued to review a judgment of the Court of Appeals of the State of New York, entered December 1, 1971, which affirmed a judgment of the Supreme Court of the State of New York, Appellate Term, First Judicial Department, entered July 15, 1970, which affirmed a judgment of the Criminal Court of the City of New York, New York County, rendered September 17, 1969, convicting petitioner, Saul Heller, of obscenity (N.Y. Penal Law §235.05), and sentencing him to pay a fine of two hundred fifty dollars or to serve thirty days in jail. The fine was paid.

Questions Presented

Whether the New York courts properly applied constitutional standards in judging the film "Blue Movie" obscene.

Whether a state judge who has seen a film which he finds obscene may issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

Statutes Involved

N.Y. Penal Law §235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

N.Y. Penal Law §235.05 Obscenity

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a class A misdemeanor.

Jurisdiction

The petitioner sought review invoking 28 U.S.C. Section 1257 (3); the respondent concurred in his request. Certiorari was granted on May 15, 1972 and the case was set for argument together with *Roaden* v. *Kentucky,* No. 71-1134. *Heller* v. *New York,* 406 U.S. 916 (1972).

Statement of the Case

On July 31, 1969 Judge Goldberg of the Criminal Court of the City of New York attended a performance at the Garrick Theater in Manhattan, at the request of an assistant district attorney. The New York City Police Department Deputy Inspector accompanying the judge purchased the tickets to a regularly scheduled showing of the film "Blue Movie." About 100 other persons were in the theater. Neither the judge nor the inspector recalled any signs restricting admission to adults (Goldberg: 10a-14a; Smyth: 19a, 30a).*

The judge saw the entire two-hour movie without discussing it with anyone. Immediately after stepping outside the theater, Judge Goldberg signed a search warrant for the seizure of the film, and warrants for the arrest of the theater manager, the projectionist and the ticket-taker (Goldberg: 10a, 11a, 14a-15a; Smyth: 20a-21a, 27a, 30a). No one at the theater was notified or consulted prior to the issuance of the warrants (Goldberg: 17a). The warrants were signed because "it was, and is my opinion that that film is obscene, and was obscene as I saw it then under the definition" (Goldberg: 10a).

One reel of film still in the projector and the only two other reels of film in the projection booth were seized (Smyth: 27a-29a). The petitioner, Saul Heller, the theater manager, was arrested, as were Epstein and Kern, the persons described in the two other arrest warrants.

No pretrial motions were made for the return of the film or for its suppression. The cases against the ticket-taker and projectionist were dismissed on the motion of the prosecutor (5a).** On September 16 and 17, 1969 the trial was held before a panel of three judges [see N.Y.C. Crim. Ct. A. §40]; there was no request for a jury trial.

The People's proof at trial consisted of testimony concerning the arrests and seizure. The seized film was shown to the trial judges (35a-37a). The following summary of the film's contents was prepared by counsel for respondent for this Court's convenience.

---

* References are to the pages of the appendix.

** In an amendment to N.Y. Penal Law §235.15, effective July 2, 1971, it was made on affirmative defense to an obscenity change that the defendant is merely a salaried "projectionist * * * cashier, doorman, [or] usher."

"Blue Movie" consists of three reels of color film which run for more than one hour and forty-five minutes. The splices between different camera angles or different scenes are noticeable, both audibly and visually. Large sections of the sound track are unintelligible or non-existent. The trial judges indicated that they could not understand the sound and at points remarked that "the sound is dead * * * although we can observe the actors are talking to each other" (36a).

The movie appears to be divided into five major sections —pre-coital, intercourse, post-coital, dinner and shower scenes.

The film begins without any titles or credits and the only actors in the film appear fully clothed—the female in pants and a diaphanous blouse, the male in a shirt, a pair of pants and socks—on a set which consists solely of one large bed. During the extended pre-coital scenes, approximately 35 minutes, the actors begin to undress, lie in bed and play with each other. During this petting sequence, the actors fondle each other, undress completely and continue fondling each other while the center of attention shifts from the upper body to the genitalia. The actors' genital regions are explicitly shown as they repeatedly manipulate each other's genital organs.

Throughout the entire scene the actors converse on diverse topics concerning a variety of mundane topics—*e.g.,* what they did during the past week, with whom they had previously had intercourse, impressions of mutual friends. Some of these conversations are not understandable because of the poor quality of the sound track.

The actors then engage in several acts of real or simulated intercourse. One scene displays the female astride the male fondling his penis and then attempting to insert the semi-erect organ into her vagina. After turning to a male-superior position, shown in a sequence with the camera turned toward the couple from between their feet, the copulating couple turns so that the male is portrayed in profile on top of the female actively engaged in an act of intercourse. During these scenes, the camera is stationary and there is no close-up photography. However, the actors do express an awareness of the existence of the camera by commenting on it during their continuing disjointed conversations.

During the entire post-coital period, approximately twenty-five minutes, the two participants are pictured unclothed and fondling each other's genital organs. Their genital regions are explicitly shown. The couple engage in conversation, which is sometimes hard to hear because the sound is distorted; the topics discussed range from the Vietnam War to the qualifications of Mayor Lindsay. The topics shift, follow no particular pattern, show no insight, few ideas, and resemble the thoughts in newspaper headlines.

Finally, the couple undress and shower themselves. During this sequence, approximately twenty minutes, the actors are explicitly shown engaging in mutual manual genital stimulation. The camera "technique" shifts from static single-distance pictures to a series of close-ups of portions of the male and female anatomy. Several acts of either actual or simulated intercourse occur in the bathtub, while the couple sing a "song" whose only clearly identifiable line is "down on me." At the end, during actual or simulated intercourse, they make loud animal noises. There are no closing titles or credits.

The first defense expert witness at trial, Parker Tyler, a 65-year-old author of six books about motion pictures, who had occasionally written magazine articles and had lectured about films, had seen "Blue Movie" about a year before the trial and had written an eight-page chapter about it in one of his books. The movie, produced by Andy Warhol, "represents what might be called the attitude of the cool world toward sex" (59a, 60a, 64a-65a). The "cool world" is "an attitude of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction" (60a, 67a). This attitude is displayed "through the acts" and the topic of conversation is "irrelevant and immaterial." There is no story line or plot line (65a); the dialogue in Warhol films is usually improvised (69a). The witness did not find the movie "sexually stimulating" or "lewd," agreeing that "the picture that merely titillates * * * is lewd, but a picture that actually shows copulation is not lewd" (68a). The "spirit" of the picture and the fact that "the woman seems quite bored [and] gives very little cooperation to the man" distinguishes the film from the "sexploitation" movies (70a-71a).

The term "blue movies" has a special meaning in the motion picture industry; in "common parlance" the term applies to "stag movies" (Tyler, 61a-62a; *see also,* Winick, 83a). In the advertising the film was called "Blue Movie" although the original name was "Fuck" (Tyler, 62a-63a).

The second expert, Charles Winick, a 47-year-old professor of sociology at the City University of New York, who had been a consultant to numerous commissions studying the effects of mass communications on children, and who had written numerous articles and books, testified that in his opinion "Blue Movie" had a social value (78a-80a); it shows "a growing and important point of view about sexual behavior * * * a film which enables people to explore their own attitudes in a constructive way," and "it has a certain amount of clinical interest in the presentation of two different character types, a non-responsive woman * * * and an aggressive fellow" (78a). The movie showed that the woman was not cooperative "to the extent that her boy friend appeared to wish" (91a-94a).

Because of the lack of closeups the witness was uncertain whether there was actual penetration during the intercourse scene. However, "I would say that it is likely that in fact they had engaged in sexual intercourse." He would also say that it was the intention of the film to convey the impression that they had (80a). The movie has value in clinical classes at medical school or for psychiatric residents. At first the witness stated he would not present it to a college-age group; he later changed his mind (91a-92a). Since the sex act was presented without frills, and was portrayed realistically, Dr. Winick's "own feeling is that it would clearly be a sexual depressant"; "a realistic showing of an act of intercourse would not titillate the public" (79a, 82a, 97a-100a). The conversation between the actors does not "lend credence to the socially redeeming value," but shows the actual discontinuity of topics that are discussed during intimate moments; the particular topics discussed "is extremely important" (85a-86a). The actors showed a consciousness of being filmed; indeed, on occasion they spoke about the movie or a particular camera angle; thus the audience identifies "with the artist and the [film's] director" (86a-89a). The movie emphasizes the realism in the incident, without accenting the highs and lows of the sexual experience (85a, 89a, 90a). The uneven sound track and occasional lack of focus help convey a sense of reality (96a).

The final defense expert, Thomas Phillips, a 27-year-old writer for radio station WQXR and various publications, testified that he had written an article about "Blue Movie" for The Village Voice; he believed that the movie had social value, that is, it was "about the political and social situation in this country today" (106a-107a, 128a-130a). The movie conveyed the actors' disaffection with society and their "powerlessness" to control it; their solution was "to stay home, to refuse to contend with the situation and to find what happiness you can in private personal relationships" (107a, 110a, 118a-124a). The sound track was designed to be partly inaudible because it portrayed realism; "it is a technique that is used quite a bit" (108a-109a). The witness noted that the film contained "a great deal of conversation" (111a). However, there is "an organic connection between the sexual intercourse scene and the political scene. To express it very succinctly, * * * I think the sexual intercourse was an emblem of the alternative of struggling against corruption and disorder in society" (114a-115a). "It was a very benign view of sexual intercourse in a friendly case" [*sic*] (115a). In response to a question from the Presiding Judge, "Could you say that the * * * photographic depiction of the intercourse, and the manipulation of the male's private organ, was a tasteful way of showing the actors' dissent with taxes, war and politics?", the witness replied, "I think that it was a tasteful way * * * and more tasteful than the sex scenes one generally sees in movies which do not include genital organs [because] * * * it was so realistic that it was relatively normal compared to the hysteria and exaggeration that appear in the cleverly censored sex films" (123a).

The petitioner, Saul Heller, testified that he had been the manager of Andy Warhol Garrick Theater for two years. He stated that when "Blue Movie" was playing at this theater there had been a sign at the box office with an "X" and a notice that "says no one under 17 admitted" (132a, 134a). Mr. Heller instructed each of the employees —ticket cashiers and ushers—that persons obviously under 18 years old were to be excluded unless they had identification showing their true age (134a-135a). He had seen the picture before his arrest (137a).

At the end of the People's case and at the end of the entire case petitioner moved to dismiss, emphasizing the alleged constitutional deficiency in the search-and-seizure procedure which did not provide a prior adversary hearing. The petitioner was found guilty by a unanimous court, which rendered the following opinion:

> "It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.

"We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.

"With respect to the absence of adversary proceeding as provided in the Code of Criminal Procedure, Section 22a, [*] I think we are in agreement, Counsel has indicated there is no provision for an adversary proceeding under that section with respect to motion picture films.

"We find that the motion picture in question is hard core pornography, see People versus Richmond County News [9] New York 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F. 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104 under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work and material in question has redeeming social value.

---

[*] The statute [currently codified as N.Y.C.P.L.R. §6330] referred o by the trial court provided, at the time of the instant trial, for an njunctive procedure to prevent distribution of any "book, magazine, amphlet, comic book, story paper, writing, paper, picture, drawing, hotograph, figure, image on any written or printed matter of an indeent character, which is obscene, lewd, lascivious, filthy, indecent or lisgusting." This Court has upheld the constitutionality of the proceure set forth in that statute. *Kingsley Arms, Inc.* v. *Brown*, 354 J.S. 436 (1954). By an amendment effective August 31, 1972, the tatute has been changed to include a "motion picture" as a subject of n injunction proceeding. Laws of New York 1972, chap. 826.

> That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. The expert testimony in this case presented by the defendant is not persuasive." (158a-159a).

The petitioner was thereafter sentenced to pay a fine of $250 or to serve thirty days in jail. He paid the fine.

On appeal to the Appellate Term, Heller contended that the film is not obscene. He also argued that the film should not have been seized pursuant to a search warrant because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant.

The Appellate Term, which had viewed the film, affirmed the conviction, without opinion (179a). One justice dissented on the ground that the film was not obscene (179a-180a).

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an *ex parte* judicial determination is necessary before a search warrant for an obscene film may be issued and the movie seized. He also asserted that "Blue Movie" is not obscene.

The Court of Appeals viewed the film. The five-judge majority found it to be obscene. The majority also rejected the argument that this Court's previous decisions mandate an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the Second Circuit in *Bethview Amusement Corp.* v. *Cahn*, 416

F.2d 410 (1969), *cert. denied* 397 U.S. 920 (1970) and *Astro Cinema Corp.* v. *Mackell,* 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." *People* v. *Heller,* 29 N.Y.2d 319 (1971) [181a-185a]. The two-judge dissenting opinion, written by the Chief Judge, said that the film is not obscene; therefore, the search-and-seizure issue need not be reached (185a-186a).

Summary of Argument

New York's explicit statutory definition of obscenity fully complies with this Court's decisions and incorporates each element of the established three-fold test. "Blue Movie," as seen by the state trial court and appellate judges, falls within the category of material that is not protected under First Amendment: it appeals to prurient interest in sex, it is patently offensive as measured by contemporary community standards, and it is utterly without redeeming social value.

The right of an individual, in his own home, to see obscene films does not carry with it the right of a commercial exhibitor to show an obscene film, even if the showing is neither pandered to an unwilling public nor offered to juveniles. The Court has consistently recognized a State interest in controlling obscenity. The historical analysis n *Roth* v. *United States,* 354 U.S. 476 (1957), overwhelmngly established that the First Amendment does not limit hat interest. The recent studies on the effects of obscenity aise questions of policy appropriate for legislators; they lo not undercut the valid State interest in preventing the lissemination, even to consenting adults, of obscenity.

The issuance of a search warrant for the seizure of an obscene film by a magistrate who has seen a public exhibition of the movie fully complies with Fourth Amendment requisites. The procedure ensures that there is more than probable cause to believe that a crime has been committed, and does not rely upon the opinions or conclusions of a police officer. When the judge sees the entire film, he can "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717 (1962). Nor does the First Amendment require a prior adversary hearing. Contrary to the view of lower federal courts, this Court has not required adversary hearings prior to the issuance of a warrant for the seizure of a single film for use as evidence at a criminal trial. This Court's decisions require that prior adversary hearings are necessary, if at all, only for massive seizures of possibly protected material.

It is well settled that if a government may validly regulate a non-protected area (such as obscenity or draft cards), minor, incidental infringements on possible First Amendment rights of expression are permissible. *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Smith* v. *California*, 361 U.S. 147, 154-156 (1959). Since the State may validly regulate obscenity, which is not protected, it may use a form of regulation that is carefully controlled to prevent more than mere, incidental interference with protected material. In determining whether regulation of obscenity requires an adversary hearing prior to a seizure of a film pursuant to a warrant, there must be a balancing between possible harm to protected speech by the mistaken seizure of non-obscene material, and possible harm to valid regulation of obscenity by imposition of additional hearings or prohibition of seizure.

Adversary hearings prior to the issuance of search warrants would not safeguard protected speech, preventing erroneous seizures of non-obscene films, more than the New York procedure does. Once the magistrate has seen the film, the factual issues are resolved and argument by counsel of each side is not of much value. The legal issues can be resolved by prompt post-seizure hearings. On the other hand, prior adversary hearings lead to delay in the initiation of charges and in their prompt disposition. Additionally, evidence of a defendant's guilt on a particular date—the film itself—must be preserved; prior hearings—or their alternative, no seizures—present a major obstacle to this. There is a ready alternative for the exhibitor, replacement of the film with another print. If, as here, the record does not exclude that alternative, no finding of undue intrusion by the State is supportable.

POINT I

The New York state courts properly applied constitutional standards in finding the film obscene.

The trial court and two state appellate courts, after each saw the entire film, found that "Blue Movie" was obscene under the New York Penal Law. Petitioner contends that the movie, although "banal," is not obscene; however, he presents nothing to establish that claim. The state courts properly applied the statutes and constitutional law that govern the case.

The New York obscenity statutes, drafted to codify the Court's holdings as to the scope of possibility obscenity, contain the proper ascertainable standards of guilt. As it applies to this case, N.Y. Penal Law §235.00 (reproduced at p. 2, *supra*) provides that for material to be "obscene" the prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. The draftsmen of the statute thus incorporated the three-fold test which they ascertained in this Court's opinions. See *Redrup* v. *New York,* 386 U.S. 767 (1967); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966); *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478 (1962); *Roth* v. *United States,* 354 U.S. 476 (1957); *cf. United States* v. *35mm Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2d Cir. 1970), cert. granted *sub nom. United States* v. *Unicorn Enterprises, Inc.,* 401 U.S. 907 (1971), cert. dismissed 403 U.S. 925 (1971). See Denzer and McQuillan, *Practice Commentary,* N.Y. Penal Law §235.00; see also Commission Staff Notes, Proposed New York Penal Law, Thompson ed. (1964), notes to article 240, p. 385; Model Penal Code (Prop. Off. Draft 1962), §251.4(1). "That §235.00 of the New York Penal Law conforms to the standards of *Roth* and the cases following that decision is beyond question." *Overstock Book Company* v. *Barry,* 436 F.2d 1289, 1293 (2d Cir. 1970); accord *Milky Way Productions, Inc.* v. *Leary,* 305 F.Supp. 288 (S.D.N.Y. 1969) (three-judge court), aff'd *sub nom. New York Feed Co., Inc.* v. *Leary,* 397 U.S. 98 (1970). Thus, "obscenity" as defined by the New York Legislature embraces only matter that has been held to be beyond the purview of the First Amendment.

The state courts' conclusion that the film they saw falls outside the ambit of the Constitution's protection is amply warranted. The film portrays acts of sexual intercourse interspersed with irrelevant dialogue. There are incidents such as acts of sexual intercourse in a bathtub, the manipulation of the male's genital organ by the female in the shower "rais[ing] it from a flaccid state to at least a semi-erect state" (see 93a), and actual intercourse (see 80a) on the bed where "the audience saw the female astride the male, and assisting his erect penis into her vaginal area" (see 113a). The entire picture is devoted to sexual activity in such a way that the court cannot be faulted for concluding that the film, as its title suggests (61a-63a), appealed "to prurient, shameful or morbid interest in nudity [or] sex," and that it went "substantially beyond customary limits of candor in describing or in presenting such matters." N.Y. Penal Law §235.00(1).

And the finders of the facts, having heard the experts presented by the defense, rejected their testimony, stating that it "was not persuasive" (159a), and concluded that the film "is utterly without redeeming social value." Penal Law §235.00(1). The experts claimed to find that value of the film was in either its presentation of the "cool world's" attitude toward sex (Tyler), its view about sexual behavior (Winnick), or its presentation of the political and social situation (Phillips). The trial court could have rejected these alternative theories, finding them to be no more than an attempt to find a use for the rambling, random "dialogue" in what would otherwise be a "stag film." Unlike the movie in *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow),"* 404 F.2d 196 (2d Cir. 1968), where the court found an idea in the film and an attempt at artistic presentation, the film in question here has no such values. Indeed, even a movie such as "I Am Curious (Yellow)," which has a plot, and, as the Second Circuit held, redeeming social value, has been held to lack such value and to be obscene in some jurisdictions. *Wagenheimer* v. *Maryland State Board of Censors,* 255 Md. 297, 258 A.2d 240 (1970), aff'd *sub nom. Grove Press, Inc.* v. *Maryland State Board of Censors,* 401 U.S. 480 (1971) (equally divided court); see also *Karelexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), rev'd on other grounds, 401 U.S. 216 (1971). It is clear from the film itself that there is no predominant theme in "Blue Movie," except for the depicting of sexual acts. But even the physical acts do not have the redeeming value of being instructive or informative, as in *United States* v. *35mm. Motion Picture Film Entitled "Language of Love." supra,* a case in which this Court granted the Government's peition for certiorari to review the finding that the film was protected. The film, "Language of Love," although more explicit in its depiction of physical sexual contact than "Blue Movie," was "not characterized by the forbidden 'leer of the sensualist.' *Ginzberg* v. *United States,* 383 U.S. 463, 468 (1966)." 432 F.2d at 712. Nor does "Blue Movie" merely show titillating pictures of portions of the bodies of "actors" engaged in intercourse or merely display photographs of naked women, which the Kentucky Supreme Court found obscene in "I, A Woman." *Cain* v. *Commonwealth,* 437 S.W.2d 769 (1969). Thus this Court's *per curiam* reversal in *Cain,* simply citing

Redrup v. *New York, supra,* does not mean that the instant film is not obscene. *Cain* v. *Kentucky,* 397 U.S. 319 (1970).

Indeed, "Blue Movie" is much like "Un Chant d'Amour," which was held to be obscene in *Landau* v. *Fording,* 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd, 388 U.S. 456 (1967), overruled on other grounds, *People* v. *Noroff,* 67 Cal. 2d 791, 63 Cal. Rptr. 575, 576 (1967). Despite some expert testimony that the film dealt with prison problems, the California courts, as affirmed by this Court, upheld the conviction. There, as here, "none of the witnesses produced could agree on its dominant theme." 54 Cal. Rptr. at 182. The pictures here and in *Landau* also have some similarity because they are both by men whose other works have some artistic value—"Un Chant d'Amour" was by Jean Genet, "Blue Movie" by Andy Warhol. But as the California court rejected Genet's prominence as a defense, noting, "the artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture in the fields covered by the film" and that "great artists can create the type of hard core pornography proscribed" [*Landau* v. *Fording,* 54 Cal. Rptr. at 182], so did the trial court here reject Warhol's.

The trial court here found "that the motion picture in question is hard core pornography" (159a). Apparently the reference to "hard core" pornography is to the New York case law, handed down prior to the enactment of the 1967 Penal Law, which held that only "hard core" material was proscribed. See *People* v. *Richmond County News,* 9 N.Y.2d 578 (1961); *People* v. *Fritch,* 13 N.Y.2d 119 (1963); *People* v. *G.I. Distributors,* 20 N.Y.2d 104 (1967). That standard "delimits a narrower class of conduct than that delimited under the *Roth* decision." *Mishkin* v. *New York*, 383 U.S. 502, 506 (1966). Under either the "hard core" test or under the established, broader tests of obscenity "Blue Movie" is obscene.

Petitioner never challenged the findings that he "promoted" the film or that he produced an obscene "performance," and that he knew the film's contents. Accordingly, his guilt of the crime of obscenity was established and the state court's finding on this issue is correct.

Petitioner relies upon *Stanley* v. *Georgia*, 394 U.S. 557 (1969), apparently arguing that since adults could possess obscenity in their own home, "it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it" (brief, p. 21). The record, however, is inadequate for a decision on this question. For although petitioner himself testified that there were signs and instructions to his employees to exclude minors (133a-138a), both prosecution witness, the judge and inspector, denied any recollection of any signs (Goldberg, 14a; Smyth, 30a-31a) thereby casting doubt on petitioner's self-serving testimony. There is an absence of any finding of fact as to whether minors were excluded.

Similarly, there was no finding at the trial as to the content or manner of the advertising. Since the prior decisions of this Court have held that "pandering" is not a necessary element in any obscenity prosecution, but is merely to be a factor to be considered on the issue of obscenity *vel non* in a close case [see *Ginzberg* v. *United*

States, 383 U.S. 463 (1966); *Redrup* v. *New York, supra*], the prosecution offered no proof on the subject. That some facts on this subject could have been developed was established by the defense witness, Tyler, who testified that the original name of this film was "Fuck," but that it was changed in the advertising to "Blue Movie"—a name meaning, "in common parlance," "stag movies" (61a-63a). The absence of an adequate record here suggests that the issue posited by peitioner be decided in other cases.* *Cf. United States* v. *Reidel,* 402 U.S. 351, 361-2 (1971) (MARSHALL, J. concurring).

The petitioner's position as stated, but not argued, in his brief, is that *Stanley* v. *Georgia, supra,* should be expanded to the ultimate limits that its reasoning will support. *Cf. Karalexis* v. *Byrne, supra,* 306 F.Supp. 1363. It appears, however, that this Court has already declined to accept completely the argument that the right to possess films for one's own use, protected in *Stanley,* entails a right to show them commercially to others. Thus, in *United States* v. *Reidel, supra,* the Court held that the language in *Stanley* that the Constitution protects a citizen's right "to receive information and ideas" [394 U.S. at 564] did not give Reidel the constitutional right to send obscene materials through the mails. The Court reiterated [402 U.S. at 354] the language in *Stanley* that "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." 394 U.S. at 568. From this it would follow that petitioner's apparent claim here, that the commercial showing of the film is protected, is contrary to the Court's most recent exposition.

---

* The Court has granted certiorari in three cases, to be argued October 19, 1972, which present this question. *Alexander* v. *Virginia,* No. 71-1315; *Kaplan* v. *California,* No. 71-1422; *Paris Adult Theatre I* v. *Slaton,* No. 71-1051.

This reading of *Reidel* is supported by *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), which upheld the customs seizure of obscene photographs. The plurality opinion of four justices found that importation of obscenity for commercial or private use may be banned, since *Stanley* protects the privacy of the home and "a port of entry is not a traveler's home." 402 U.S. at 376. Two justices concurred, finding that the Court need not have reached the question of the private use of the pictures, but they suggested that importation of obscenity for commercial use may be banned. Here again, the Court has held that commercial exploitation of obscenity may be banned despite the seeming sweep of *Stanley*.

Unless the Court overrules the *Roth* line of cases, the rights so explicitly set forth as the basis for *Stanley* do not apply to commercial display of an obscene film to the public. As narrowed by *Reidel* and *Thirty-Seven Photographs, Stanley's* holding is that "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch." 394 U.S. at 565. But, in the context of a movie that is openly advertised as a "stag movie," the State may tell the exhibitor what films he may not display. *Roth, Mishkin, Jacobellis, Memoirs, Ginzberg, Stanley* and *Reidel* have reiterated that there is a valid state interest in controlling obscenity. But what control is there if the obscene films may be held out to the public in a commercial setting?

In *Roth,* the Court, analyzing the historical sources of the First Amendment, held that the Bill of Rights did not foreclose prosecutions for obscenity. See also, *Smith* v. *California,* 361 U.S. 147, 152 (1959); *Jacobellis* v. *Ohio, supra* at 186-7 (BRENNAN, J.). Nothing in any of the Court's subsequent obscenity decisions has rejected that holding or its underpinnings. As Mr. Justice MARSHALL, writing for the Court in *Stanley,* noted:

> "None of the statements cited by the Court in *Roth* for the proposition that 'this Court has always assumed that obscenity is not protected by the freedoms of speech and press' were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials." 394 U.S. at 560-1.

There have, however, been recent studies suggesting that obscene materials do not necessarily lead to deviate sexual behavior or violent sexual crimes. See, *e.g.,* the studies summarized in The Impact of Erotica, Report of the Effects Panel, The Report of the Commission on Obscenity and Pornography [Report], Government Printing Office, 1970, pp. 139-263. But these studies do not answer the question whether the Constitution, as written and interpreted, prohibits obscenity prosecutions if the material is shown to consenting adults. The studies, to the extent that they reach any conclusion, establish only that exposure to obscenity does not present a clear and present or probable danger of antisocial conduct. As the Court stated in *Roth*:

> "But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois, supra* [343 U.S. 250 (1954)] at 266:
>
> > 'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.' " 394 U.S. at 560-1.

The suggestion by 12 of the 17 members of the Commission on Obscenity and Pornography "that federal, state, and local legislation prohibiting the sale, exposition or distribution of sexual materials to consenting adults should be repealed" [Report, *supra,* at 51-3] was left, by the Commissioners themselves, to the state and federal legislatures. And correctly so. The decision to depart from the well-established, indeed over 250-year-old practice [see Acts of and Laws of the Province of Mass. Bay, c. CV, §8 (1712), Mass. Bay Colony Charter & Laws 399 (1814)], is properly one for the deliberations of the elected representatives of the People. The substantial, difficult policy questions involved in such a debate are addressed to the desirability of preventing the dissemination of materials whose "predominant appeal is to prurient, shameful or morbid interest in nudity, sex * * *" [see N.Y. Penal Law §235.00(1)] and which otherwise meet the obscenity tests. The power of Legislature to choose, it appears, was settled in *Roth*. It may well be that some States, swayed by the Report's conclusions, may choose to delete the crime of obscenity insofar as it applies to consenting adults. Others, however, may choose to exercise their power "to promote the health, safety, morals and general welfare of its people" [*Near v. Minnesota,* 283 U.S. 697, 707 (1931)] and may seek to prevent the dissemination of material that appreciably lowers the general level of public morality. While the Court has held that private morality may be jeopardized in the confines of one's home, it has declined to foreclose control of the public, commercial, advertised spread of obscenity.

It cannot be presumed that the mere notice to potential adult viewers that a film is obscene or has explicit sexual content is sufficient. The notice would not remove the film from the stream of public display and would not prevent what the State deems to be harmful dissemination. The notice itself, by announcing the sexual content of the film, will induce some persons to enter the theater. Indeed, under the current movie-rating system, some exhibitors in New York have lowered their rating to an "X" to attract those who are looking for more sexual content than actually is in the film. It is uncertain, therefore, whether notice to the public of a film's sexual content will serve to warn unwilling viewers or to attract those marginally interested in obscenity. Under the circumstances, the Court should not hold that the Bill of Rights mandates a system of rating the sexual content of films.

POINT II

A judge may constitutionally issue a warrant directing the seizure of a film which he has seen in its entirety and which he has found to be obscene.

A judge of the Criminal Court of the City of New York attended a regular showing of "Blue Movie" at a movie theater in Greenwich Village in New York City. Immediately after seeing the entire—nearly two-hour long—film, the judge issued a search warrant for the seizure of the film and warrants for the arrest of the theater manager, projectionist and ticket taker. The petitioner asserts that this procedure violated the First, Fourth and Fourteenth Amendments of the Constitution.

It is beyond question that the issuance of the warrants complied with the Fourth Amendment. The constitution requires that the warrant be issued by a "neutral, detached magistrate instead of being judged by the officer engaged in the often compeitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948); *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932); *Giordenello* v. *United States,* 357 U.S. 480, 485-6 (1958); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 449-53 (1971). In the case at bar the judge, rather than relying on a police officer's statements as to what he had seen or what unnamed "reliable" informants had told him about the material to be seized and the place to be searched, saw the corpus of the crime, at the place where the seizure was to occur. Surely, this more than met the Fourth Amendment's requirement that there be "probable cause" that the specifically described evidence of crime which is to be seized will be at the place described in the warrant. "Probable cause" exists when the facts are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162." *Brinegar* v. *United States,* 338 U.S. 160, 175-6 (1949); see *United States* v. *Ventresca,* 380 U.S. 102, 107-8 (1965); *Ker* v. *California,* 374 U.S. 23, 35 (1963); *cf. Locke* v. *United States,* 11 U.S. (7 Cranch) 339, 348 (1813). When the magistrate has determined that the movie he has just seen "was obscene as I saw it under the definition of 'obscene' " (10a),* he has more than reasonable ground to believe that it was properly subject to seizure as evidence of, and the instrument of, a crime [*cf. Warden* v. *Hayden,* 387 U.S. 294 (1967)], and that it would be found in the projection booth.** Thus, the traditional Fourth Amendment tests were met; indeed, petitioner suggests no defects.

The Court in *Marcus* v. *Search Warrant,* 367 U.S. 717, 730-3 (1961), noted that the "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure" is impermissible. Different standards for seizures apply. In *Marcus,* the warrant allowed the seizure of 11,000 copies of 280 different publications; the warrant was issued without the magistrate's seeing the material, and—since the officer merely averred that he had bought certain books in a given store—without an affiant specifically describing the contents of the material to be seized, and without the warrants themselves adequately describing the material to be seized. "They left to the individual judgment of each * * * [officer] the selection of such magazines as in his view constituted 'obscene * * * publications.'" 367 U.S. at 732. The Court, although noting that a question was raised whether an adversary hearing is necessary prior to the issuance of a warrant, did not decide it [367 U.S. at 731-2], but found error in the absence of a procedure "designed to focus searchingly on the question of obscenity." *Id.* at 732. This type of procedure is required because of the difficulty in correctly concluding that something either is or is not obscene. The Constitution demands more than a police officer's conclusions that something is obscene. The New York procedure at issue here is one that allows a magistrate to focus on the issue.

---

* In light of the finding that the film was actually obscene, this Court need not face the question, proposed by some courts, whether a finding of "probable cause" to believe that a film is obscene is sufficient to justify the issuance of a search warrant. Compare *Merritt* v. *Lewis,* 309 F.Supp. 1249 (E.D. Cal. 1970) with *United States* v. *Pryba,* 312 F.Supp. 466 (D.D.C. 1970); see Note, The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures? 46 N.Y.U.L. Rev. 80, 85-88 (1971).

** The Fourth Amendment's requirements would be satisfied if the judge, relying upon an affidavit of a police officer who saw the film and described it in detail, signed the warrant without seeing the film personally. This is the procedure that is followed in California. See *Schackman* v. *Annebergh,* 258 F.Supp. 983, 989-90 (C.D. Cal. 1966); *People* v. *DeRenzy,* 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969), hearing denied by Calif. Sup. Ct. Sept. 24, 1969; *People* v. *Luros,* 4 Cal. 3d 84, 88, 92 Cal. Rptr. 833, 835 (1971).

In the light of this Court's decision in *Marcus,* the New York Court of Appeals adopted a rule that prior to the issuance of a warrant for the seizure of obscenity, the magistrate must actually see the material to be seized, and the warrant must specifically describe it. *People* v. *Rothenberg,* 20 N.Y.2d 35 (1967); see *People* v. *Abronovitz,* 31 N.Y. 2d 160 (1972). When a magistrate sees a film for the purpose of determining whether to issue a warrant for evidence of a crime that has been committed in his presence [not as petitioner asserts "in his role as censor" (brief, p. 11)], the procedure is indeed one "designed to focus searchingly on the question of obscenity." In *Lee*

Art Theatres, Inc. v. *Virginia,* 392 U.S. 363 (1968), the court considered the seizure of two films that had occurred on the authority of a warrant issued by a justice of the peace. The affidavit requested a warrant for "lewd and obscene motion pictures" which were described only by name; the officer averred that probable cause was found from "personal observation of repetition of the above mentioned motion picture and previews" and from "observation of the billboard in front of the theatre." Petition for certiorari, Appendix 2a-3a. Describing the officer's affirmation as nothing more than conclusory assertions, the Court invalidated the warrant and the resulting seizures on the authority of *Marcus.* The Court did not set out guidelines for further cases, did not discuss whether prior adversary hearings were constitutionally required, and did not even hold the *Rothenberg* rule to be required.

> "It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' * * * and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Lee Art Theatres, Inc.* v. *Virginia, supra,* at 637.

The deficiencies found in *Lee Art Theatres* that somewhat paralleled those in *People* v. *Abronovitz, supra,* are obviously absent here. Thus, the Fourth Amendment's teachings, as applicable to obscenity cases, have been scrupulously followed by New York.

There remains then the question whether the First Amendment requires the application of special procedures not required under the Fourth.

The question has arisen since the Court's decision in *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964). In that case an information was filed by Kansas Attorney General alleging that 59 obscene books were located in a particular county, and seeking the condemnation of the material. Following a 45-minute perusal of seven books, a magistrate issued a warrant authorizing the seizure of all 59 items. When the warrant was executed, 31 titles were seized and, in all, more than 1700 books were impounded. The plurality opinion of Mr. Justice BRENNAN, for four justices of the court, recognized that this massive seizure was "more repressive that an injunction preventing further sale of the books," and held that the seizures which were made without a previous adversary judicial hearing were not constitutionally valid.

The application of the Fourth Amendment was not passed upon [378 U.S. at 210 n. 2, 213], the holding being grounded on the "danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *Id.* at 213. Three justices concurred in the result—two on the ground that any suppression of allegedly obscene material is unconstitutional, Mr. Justice STEWART on the ground that the material was not "hard core" pornography. Two justices dissented.

It appears that the primary basis for decision was the belief that a massive seizure was inherently confiscatory and deprived society of its constitutional right to receive material. This interpretation is confirmed by *Mishkin* v. *New York,* 383 U.S. 502, 512-13 (1966), where the Court refused to review the legality of a seizure challenged under *A Quantity of Books* since the record did not reveal the number of books seized under the warrant, or show whether the seizure was massive or "whether the books seized * * * were on the threshold of dissemination." Of course, if *A Quantity of Books* applied to all seizures of obscene material, there would have been no need for the court to abstain from review, since the parties had conceded that there was no prior adversary hearing. Additionally, the absence of a reference to *A Quantity of Books* in the decision in *Lee Art Theatres, supra,* gives added force to the conclusion that *A Quantity of Books* did not settle whether there is an absolute right to an adversary hearing in all obscenity cases.

However, subsequent to the decision in *A Quantity of Books,* six federal courts of appeals, relying upon the plurality opinion in *A Quantity of Books* and upon *Marcus,* have held that this Court has already required adversary hearings prior to the seizure of allegedly obscene material. The federal courts have precluded state prosecutions that do not conform to their view of this Court's holdings.*

---

* Despite the Court's decision in *Younger* v. *Harris,* 401 U.S. 37 (1971) and the related cases [*e.g. Byrne* v. *Karalexis,* 401 U.S. 216 (1971)], the federal courts, at least in New York, have continued to impose their view on the state's pending prosecutions. They use the rubric of requiring a return of the property rather than using the pre-*Younger* language of injunction. See, *e.g. MOD Amusement Corp.* v. *Murphy,* 335 F.Supp. 1267 (S.D.N.Y. 1971), motion for stay denied January 12, 1972 (2d Cir.).

See, *e.g., Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2d Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); *Cambist Films* v. *Duggan,* 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc.* v. *Wilkinson,* 410 F.2d 639 (4th Cir. 1969), *cert. denied,* 396 U.S. 985 (1969); *Metzger* v. *Pearcy,* 393 F.2d 202 (7th Cir. 1968); *United States* v. *Alexander,* 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc* v. *Ferdon,* 426 F.2d 643 (9th Cir. 1970), rev'd on other grounds, 401 U.S. 990 (1971). Several state supreme courts, relying on the same authorities, have reached the opposite conclusion. See, *e.g., Roaden* v. *Commonwealth,* 473 SW 2d 814 (Ky. 1971), *cert. granted* 406 U.S. 905, No. 71-1134; *Commonwealth* v. *State Amusement Corp.,* 356 Mass. 715, 248 NE 2d 497 (1969); *State* v. *Rabe,* 79 Wash. 2d 254, 484 P.2d 917 (1970) rev'd on other grounds, 405 U.S. 313 (1972); *State* v. *Burgin,* 255 S.C. 237, 178 SE 2d 325 (1970), rev'd on other grounds 404 U.S. 806 (1971); *State* v. *Albini,* 31 Ohio St. 2d 27, 285 NE 2d 327 (1972). Petitioner, relying mainly upon the Second Circuit's opinion in *Bethview* and on *A Quantity of Books,* argues that an adversary hearing is always necessary if obscene material is to be seized. The cases upon which he relies do not compel this Court to deviate from its well established holding that it is the judicial presence and not the adversary's which is necessary before the issuance of a search warrant .

It is well settled that the States may validly impose regulations that have an incidental effect on free speech if the regulation is pursuant to a valid governmental interest that is not aimed at suppressing protected speech. A recent formulation of this principle appeared in *United States* v. *O'Brien,* 391 U.S. 367, 376-7 (1968):

> "This Court has held that when 'speech" and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms * * * [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." See also *Street* v. *New York*, 394 U.S. 576, 594-617 (1969) (dissenting opinions); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969); *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

The control of obscenity is such an interest. As noted in Point I, *supra*, obscenity is not protected under the First Amendment and may be validly regulated. The constitutional question is whether a particular regulatory device has sufficient incidental side-effects that infringe on protected speech, that the device must be banned. As the Court noted in *Smith* v. *California*, 361 U.S. 147, 154-5 (1959), "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene * * *." The Court has not, however, banned the enforcement of such statutes.

The question whether the First Amendment requires an adversary hearing prior to the seizure of a film, even if a judge has seen the film and found it obscene, must be answered in the light of these principles. Regulation of obscenity, and the seizure of an obscene film, are "unrelated to the suppression of free expression." If permitting the seizure of obscene films results occasionally in the seizure of a film later determined not to be obscene, that restriction is "incidental." Nor would it be significantly reduced by adversary hearings. On the other hand, imposing cumbersome prior hearings would significantly interfere with the exercise of "the constitutional power of the government" to prohibit obscenity. To these considerations we now turn.

The conclusion that the seizure of a single print of a film is always equivalent to the massive seizure condemned in *A Quantity of Books* is unsound. While the seizure of all prints of a film may have the same effect as seizing the entire stock of magazines in *Marcus* and *A Quantity of Books*, films for commercial distribution are readily available in additional prints. In fact, "Blue Movie" has been shown in numerous locations, even though the seized print remains in the custody of the State. The Court of Appeals for the Second Circuit in *Astro Cinema Corp., Inc.* v. *Mackell, supra,* rejected the argument that the availability of other prints may allow a different result. The court noted that "by the same token, another shipment of magazines or books in *Marcus* and *A Quantity of Books* might have been obtained from the distributor or publisher. The point in each instance is that the State wishes to interfere with the distribution of films or books. It must first provide, as we have been instructed, an adversary hearing capable of affording a reasonable likelihood that non-obscene books will reach the public." 422 F.2d at 295-6. In so ruling, the court too readily equated a print of a film and a storehouse of books. Seizure of one print of a film is more appropriately equated with seizure of one copy of a book—even the last copy in the store.

As this Court pointed out in *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495 (1952), although the First Amendment's protections cover movies, it does not

> "follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Id.* at 503; *Freedman* v. *Maryland,* 380 US 50, 61 (1965); *Time Film Corp.* v. *Chicago,* 365 U.S. 43, 49 (1961).

The State, in fact, is not trying to "interfere with the distribution" of the film in question. It is, instead, attempting to preserve for trial evidence of the exhibitor's violation of the Penal Law. Where the exhibitor can readily obtain another print of the film, it would be unreasonable to hold that the public's First Amendment rights —the rights protected by *A Quantity of Books*—were violated. The practical reality of commercial distribution of movies is that the exhibitor is in the best position to obtain another copy of the work, if he intends to continue displaying it. But the prosecution, in order to sustain its burden of proof at trial, must show that the film seen by its witnesses on the date charged in the complaint is obscene. Thus, it is reasonable to allow the seizure of that print, leaving the exhibitor to obtain others, should he so decide. If the prosecution is relegated to obtaining a different print, or obtaining the shown print at a later time, it often could not ascertain whether the substitute print was identical to the one which is the subject of the criminal charges. The fear of change in the film—innocent or otherwise—is not totally without foundation, as *Demich, Inc.* v. *Fendon, supra,* 426 F.2d at 647 (CARTER, J., dissenting) points out. In *Demich* one of the plaintiffs had deleted the most objectionable parts of the film after the officer saw it but before it was seized. See also the incident described in Motion and Brief of Charles Keating, Amicus Curiae, *Roaden* v. *Kentucky,* No. 71-1134, p. 72 n.33. Of course, in some cases there may be only one print. This can be determined only by an analysis of the facts of the case. There is nothing in the record to show the facts as to the distribution of "Blue Movie." Petitioner states: "In the case as bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available (158a, 159a)" (brief, p. 10). Neither the cited pages which are the trial court's opinion, nor any part of the evidence support the assertion. In any event, the question requires a case-by-case analysis, something the federal Courts of Appeals find irrelevant. But that shows the fallacy of petitioner's argument, for a proper balancing of First and Fourth Amendment considerations against the State's right to prosecute obscenity, which the federal courts purport to sustain, would require such an analysis. See, Note, The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizure, 46 N.Y.U.L. Rev. 80, 99-100 (1971).

Not only has petitioner failed to establish that the print of "Blue Movie" was irreplaceable, but he has failed to show that an adversary hearing would have helped him, or that the requested procedure would materially increase First Amendment protection in the future. The Court has required adversary hearings only for good reason, such as prior to the issuance of an injunction to prevent a political rally. *Carroll* v. *Commissioners of Princess Anne,* 393 US 175 (1968). The Court's analysis of the reason for precluding *ex parte* orders there is relevant in the case at bar:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the are of First Amendment adjudication." *Id.* at 183

In *Carroll* the development of the facts at the hearing was crucial to the outcome of the matter. The Court indicated that "there is danger in relying exclusively on the version of events and danger presented by prosecuting officials." *Id.* at 183 n. 10. In the case at bar the primary facts could not be in dispute on the question of obscenity—the only question relevant in a First Amendment adjudication. The film itself is the essential evidence on the question, and the magistrate saw that. Too, in an obscenity prosecution, there can be no real discussion on whether the remedy, although drastic, should be used. Thus the question is whether defense evidence or argument is necessary. It seems strange that evidence of experts on the nonobscenity of the film can be received before the film is itself held as evidence. Yet that is precisely what happened in an adversary hearing held in New York County. Three days of expert testimony, which was given six weeks after the start of the hearing, and, after three weeks the court ordered the film seized. *People* v. *Shiffrin*, 64 Misc. 2d 311 (Crim. Ct. N.Y. Co. 1970); see also, *State* v. *Albini, supra,* 285 N.E.2d at 329 n. 2. That type of proceeding is surely not what the Constitution requires. And, as to the possibility that defense legal argument is needed to allow determination of the imprecise legal standard, the New York Court of Appeals cogently noted:

> "But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the *prima facie* sufficiency of ground to procecute based on probable couse. The legal issue of obscenity on the merits of the charge can be determined when the prosecution begins by appropriate motion" (184a-185a).

Moreover, under petitioner's position, if a prior adversary hearing is required, why not prior appellate review?

There are other reasons why prior adversary hearings are not required. No deprivation of the public's basic

First Amendment rights can be complained of if the legality of the act that removed the material from public circulation may be immediately litigated. *Cf. Freedman* v. *Maryland, supra* at 60; *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139, 142 (1968); *Byrne* v. *Karalexis, supra* at 221 (dissenting opinion); compare *Kingsley Arms Inc.* v. *Brown,* 354 U.S. 346 (1957). Although New York's criminal procedures set no statutory time limite within which a hearing must be held to determine the validity of a seizure, no prompt hearing was requested by petitioner. The prosecutor in New York County has said on numerous occasions that we stand ready to grant immediate hearings, on request, on defense motions to suppress material arguably protected by the First Amendment. No such motion was made by petitioner, when he was brought before the Court and arraigned on the date of his arrest, nor was one made thereafter. The chronological record of the proceedings below (1a) shows that on arraignment, July 31, 1969, the case was adjourned for 55 days to September 24; no plea was entered; no objection by petitioner was noted. However, on August 19, apparently by consent, the case was advanced to the calendar for that date, and the petitioner pleaded not guilty, requested a three-judge panel, waived "all motions," and adjourned the case to September 4. The actual trial occurred on September 16 and 17, and the guilty verdict, rendered September 17, was entered only 48 days after the seizure. The State made every effort to expedite the proceedings. Similarly, it is clear that the time involved is well within the limits this Court set in forfeiture proceedings under the customs laws—less than 14 days from the seizure to the institution of judicial proceedings and less than 60 days from the filing of the action to final decision in the district court. *United States* v. *Thirty-Seven Photographs,* 402 363, 373-4 (1971). Of course, in that case the Court specifically noted:

> "In other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." 402 U.S. at 374.

But, the deadlines set in *Thirty-Seven Photographs,* which the Court held to be consistent with *Freedman* v. *Maryland, supra,* and *Teitel Film Corp.* v. *Cusack, supra,* provide guides to proper conduct. In a criminal case, at least in New York, the charge will be initiated contemporaneously with the seizure, eliminating one form of delay found in the customs cases. Petitioner's knowing decision to waive pre-trial motions and reserve the issues for trial (6a-7a) does not entitle him to any benefits because of the delay. Indeed, even in *Thirty-Seven Photographs, supra,* the court excluded from the time limits the delay caused by the claimant. 402 U.S. at 374.

Mr. Justice WHITE in an analogous context has noted:

> "In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene and having been arrested, he will soon be brought into contact with people who can explain his rights. As Mr. Justice BRENNAN noted in a dissenting

> opinion, joined by The Chief Justice and Justices BLACK and DOUGLAS, in *Abel* v. *United States,* 362 US 217, 249-50 (1960), a search contemporaneous with a warrantless arrest is specially safeguarded since '[s]uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry* v. *United States,* 361 US 98, 100; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into. Fed. Rules Crim Proc 5(a) and (c) * * * *Mallory* v. *United States,* 354 US 449; *McNabb* v. *United States,* 318 US 332.'
>
> * * *
>
> "An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding * * *." *Chimel* v. *California,* 395 U.S. 752, 782-3 (WHITE, J., dissenting).

The seizure of a film and the subsequent immediate hearing provide the most expeditious possible disposition of the obscenity question. The person whose property has been seized is under heavy pressure, if he chooses to vindicate his or the public's rights, to proceed to a hearing. The person served with notice of a prior adversary hearing, on the other hand, is prone to seek delay, because the economic benefits which may accrue from the continued display of the material inure to his benefit alone and are hardly the public rights protected by the First Amendment.

Similarly, The American Law Institute's formulation of a rule for seizure of allegedly obscene material is impractical and goes far beyond anything this Court has contemplated. ALI, Model Code of Pre-Arraignment Procedure, Prop. Off. Draft No. 1, 1972, §SS200.6. That formulation was provided since it was felt that *A Quantity of Books* requires adversary hearings where massive seizures are made. See Commentary, *id.* at pp. 180-2. The Code allows *ex parte* issuance of warrants if there has been a determination in some other local, prior judicial proceeding that the object is obscene, and that judgment "has become final and has not been stayed." It also allows *ex parte* seizures for quantities sufficient for "evidentiary use" in the proceeding, but provides that if the effect of seizing such copies may be to stop or substantially to impede the showing or distribution of the instruments in question, the warrant shall provide that reasonable opportunity be given the possessor of such instruments to furnish duplicate copies for seizure, or to show them during thep roceeding at such times and places as the tribunal conducting the proceeding may direct."

There are two difficulties. Since immediate adversary hearings can be provided after the seizure, the cost and delay of duplication of the material are unnecessary. After the adversary hearing on a suppression motion the non-obscene material will be returned, only the probably obscene will be held. But, once there is a finding of probable obscenity, the prosecutor would be subject to strong criticism if he allowed duplication of the material and the continued violations of the penal laws. The prosecutor should not be a party to future illegality. Also, to allow the exhibitor to keep the evidence pending trial raises serious questions noted above, about the identity of the trial version of the film. In a film as long as and disjointed as "Blue Movie," additions or deletions could easily go unnoticed. And, despite suggestions that contempt or other sanctions will prevent tampering with the film, the reality of law enforcement experience is that an obscenity defendant's honesty is not to be trusted.

It may be possible in extreme cases to prove the crime of obscenity without the film itself as evidence. See, *e.g. People* v. *Morgan,* 68 Misc. 2d 667, 326 N.Y.S.2d 976 (Crim. Ct. N.Y. Co. 1971), *aff'd* N.Y.L.J. Jan. 18, 1972, p. 2, col. 3 (App. Term, 1st Dept.). But the prosecution cannot rely upon the fortuity that the movies shown will be as explicit, prurient and gross and have as little plot as "Anna's Bannana," the film in *Morgan.* The prosecution should not be forced to rely on a police officer's memory, either at the trial, or at a hearing, particularly when, as here, the obscene material is available to be used as evidence. The upshot of the adversary hearing rule has been to force prosecutors to use less direct, and less probative evidence than they are entitled to.

The practical problems so easily brushed aside by the federal Courts of Appeals present a bar to prosecution. In New York City, which apparently has become the center for the display of material obscene by any standard, the litigation engendered by the federal court's interventions has effectively thwarted prosecution. Subpoenaes for the production of the film at trial or even at an adversary hearing cannot be used. Our experience has been that service cannot be made upon non-existent, or disappearing corporations, which readily vanish on the approach of the process server or which have no agents for service and actually have legal custody of the films. Assuming a valid service, the corporation can often dispose of the film after its commercial value is gone [*Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546, 549 (S.D.N.Y. 1969)], and can validly rely upon the rental agreement which requires them to return it to the distributor on a day certain. *Cf. People* v. *Steinberg,* 60 Misc. 2d 1041, 1045-6, 304 N.Y.S.2d 858, 863 (Co. Ct. West. Co. 1969). The assumption of the federal courts, that the obscenity defendants will cooperate with law enforcement, is hardly an accurate one.

The Constitution does not require an adversary hearing before evidence is seized. Nor does it require such a hearing in all cases involving the seizure of obscenity. The First and Fourth Amendments do require the use of delicate tools if the State chooses to regulate obscenity. A proceeding in which a Judge sees an entire film before ordering its seizure is such a tool.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

Frank S. Hogan
District Attorney
New York County

Michael R. Juviler
Lewis R. Friedman
Assistant District Attorneys
Of Counsel

October, 1972

We gratefully acknowledge the assistance in the preparation of this brief provided by Philip La Penta and Allen G. Swan, Criminal Law Investigators in the Office of the District Attorney, New York County, and Peter Benedek, student at Columbia University Law School.

CO

IN THE

Supreme Court of the United States

Motion
FILED
NOV 13 1972
MICHAEL RODAK, JR., CLERK

October Term, 1972

No. 71-1043

reme Court, U.S.
ILED
OV 20 1972
EL RODAK, JR., CLERK

SAUL HELLER

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

On Writ of Certiorari to the Court of Appeals
of the State of New York

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Respondent with Brief Annexed

CHARLES H. KEATING, JR.,
18th Floor, Provident Tower,
One East Fourth Street
Cincinnati, Ohio 45202
Amicus Curiae

Richard M. Bertsch
James J. Clancy
Ray T. Dreher
Albert S. Johnston III
440 Leader Bldg.
Cleveland, Ohio 44114
Of Counsel

Supreme Court, U.S.
FILED
NOV 20 1972
MICHAEL RODAK, JR., CLERK

SUBJECT INDEX

Page

Motion of Charles H. Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Respondent With Brief Annexed 1

Brief Amicus Curiae of Charles H. Keating Jr., in Support of Respondent 21

Statement of the Case 21

A. Background 21

B. The Trial 23

1. Plaintiff's Case in Chief 24

2. The Defense 65

Summary of Argument 85

Argument 95

Introduction 95

Due Process of Law Was Accorded The Petitioner At Each of The Three Stages of The Criminal Proceedings Being Contested Herein, i.e. (1) At the Time of Petitioner's Arrest On a Charge of Showing an Obscene Movie to the General Public (2) When the Positive Print Used by Petitioner to Project the Visual Images and Sound Track Was Seized Incident to the Arrest as Evidence Bearing on the Charge, and (3) When the Positive Film Print Was Admitted Into Evidence at the Trial, Following the Commonwealth's Laying of the Proper Foundation in the Chain of Evidence 97

Page

A. Petitioner Was Not Deprived of Due Process When He Was Arrested by Deputy Inspector Smyth on a Charge of Showing an Obscene Movie to the General Public 97

1. A Law Which Proscribes the Public Exhibition of Obscene Films and Designates the Same to be a Misdeamor Crime is Constitutional as a Valid Exercise of the Police Power of the State. 99

2. Under New York Law, Deputy Inspector Smyth as a Peace Officer Had the Authority to Arrest a Person with or without a Warrant For a Misdemeanor Committed in His Presence 102

3. Whether a Particular Arrest is Constitutional or Not Depends Upon Whether at the Moment the Arrest Was Made, the Officer Had "Probable Cause" to Make it. 103

4. The Petitioner is in Error When He Claims That the "Probable Cause" Determination Which Must Precede and Which Authorizes an Arrest for an Obscenity Crime is the Exclusive Province of the Judiciary and may only be made after an Adversary hearing. 105

5. Deputy Inspector Smyth Had "Probable Cause to Make the arrest" 112

(a) Deputy Inspector Smyth Had a Right and Duty Under the New York Statutes to Make a Value Judgment as to Whether the Film Was Obscene 112

(b) Deputy Inspector Smyth Was Entitled to Rely Upon the Legal Counsel of the District Attorney Who Attended the Movie on July 30, 1969 115

(c) Petitioner Having Failed to Attack the Arrest Warrant is Precluded From Denying That "Probable Cause" For the Arrest Existed 116

B. Petitioner Was Not Deprived of Due Process When the Positive Print Used by Petitioner to Project the Audio Sound and Visual Images Was Seized Incident to the Arrest as Evidence Bearing on the Charge 117

1. Legitimate Interests of Society Require That the Autoptical Evidence Used to Project the Audio Sound and Visual Images on the Screen be Preserved Against Alteration or Destruction 117

(a) The Emergent Condition Requires That the Alleged Instrumentality of the Crime be Preserved in its Challenged Form 118

(b) Autoptical Evidence (the Motion Picture Projection Print) is to be Favored Over Testimonial Evidence of Peace Officers as to What They Saw or Heard Exhibited on the Motion Picture Screen 124

(2) The Seizure Incident to the Arrest Was Within the Reach Authorized by *Chimel v. California* 128

C. Petitioner Was Not Deprived of Due Process When the Positive Film Print Was Admitted Into Evidence at the Trial 131

Page

D. The Past Decisions of This Court Do Not Support Petitioner's Claims That the Denial of an Adversary Hearing Prior to a Search Which is Incident to Arrest Amounts to the Depriva ation of a Fundamental Constitutional Right 134

II.

A. The Motion Picture Film "Blue Movie" is Obscene in the *International* Sense (Hard-core Pornography) and as Such is *Condemned* Under the Federal Constitution 145

1. The Common Standards of Right and Wrong Embodied in the Statutory Law of this Nation and the State of New York Should be Applied as the Rule of Law in this Case in Finding the "Blue Movie" to be "Obscene as a Matter of Law." 148

2. The Performance of Sexual Intercourse in Public, Whether Real or Simulated, Live or as Part of a Motion Picture Film or Stage Play is Against Public Policy and as Such is Obscene per se 152

3. Where Obscenity per se Exists the Court can Take Judicial Notice of Such Fact and No Further Evidence on Such Issue is Necessary 159

4. The Suppression of "Blue Movie" thru Criminal Prosecution, is not "Thought control". The Interest Being Protected is the People's Right to Control "Public Morality" - A Tenth Amendment Right, Guaranteed By the Bill of Rights...................... 166

Page

(a) The Right to Proscribe Obscenity is a Tenth Amendment Right, Guaranteed by the Bill of Rights, Which Reserves to the States and to the People the The Right to Control and Regulate "Public Morality", i.e. Public Conduct, which Affects the People as a Whole. Obscenity Controls do not Attempt to "Control Thought" or to Reach "Private Morality." 166

(b) There is a Justifiable Governmental Ground for the Regulation of Obscenity by States in Whatever Form it Might Take, Either Criminal or Civil Under the Common Law, Obscenity Indecency and Lewdness were a Public Nuisance and Subject to Criminal Sanctions. 177

Conclusion 189

TABLE OF AUTHORITIES CITED

CASES

Adamson v. Calif., 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 . . . . 111, 148

Alberts v. Calif., 354 U.S. 476, 485, 493 June 22, 1957 100

A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gail v. State of Ohio ex rel Charles H. Keating, Jr., Oct. Term 1971, No. 71-599 2

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 135, 136, 139

Beck v. Ohio, 179 U.S. 89, 13 L.Ed.2d 142, 148, 85 S.Ct. 223 (1964) 104

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969) 84, 137

Bloss v. Paris Township, 157 N.W.2d 260, 261 (Apr. 1, 1968) 179-180

Boreta Enterprises, Inc. v. Dept. of Alcoholic Beverage, 2 Cal.3d 85, 84 Cal. Rptr. 113, 123 (Feb. 26, 1970) 164-165

Breithaupt v. Abram, 352 U.S. 432, 439, 1 L.Ed.2d 448, 453, 77 S.Ct. 409 (Feb. 25, 1957) 117-118

Brown v. State of Texas, 167 Tex.C.R. 351, 320 S.W.2d 670 127

Bryers v. Texas, 480 S.W.2d 712, 718 (May 31, 1972) 126

Burton v. Mun. Ct. of the Los Angeles Jud. Dist. of Los Angeles County, 68 Cal.2d 684, 441 P.2d 281, 68 Cal. Rptr. 721, 726 (June 6, 1968) 185-187

Cactus Corporation d.b.a. The Apache Drive-in v. State of Arizona, ex rel Murphy, 480 P.2d 375 (Feb. 9, 1971) 180-181

Calif. v. DeRenzy, 275 Cal.App.2d 380, 79
Cal. Rptr. 777 (Aug. 1, 1969), Hrg. den.
Calif. Sup. Ct. Sept. 24, 1969 .... 110 ....

California v. Enskat, 98 Cal.Rptr. 646, 647,
20 Cal. App.3d Supp. 1 (Sept. 21, 1971) ..... 125 .....

California v. Goulet, 98 Cal. Rptr. 782, 783,
21 Cal. App. 3d Supp. 1 (Dec. 7, 1971) ...... 125 ....

Cambist Films, Inc. v. Illinois, 292 F.
Supp. 185 (No. Dist. Ill. 1968) .... 136 ......

Cambist Films, Inc. v. Tribell, 293 F
Supp. 407 (E. Dist. Ky. 1968) .... 136-137 .

Chimel v. Calif., 395 U.S. 752, 782-783,
23 L.Ed.2d 685, 694, 89 S.Ct. 2034,
2051-2052 (June 23, 1969) ..... 11, .128-129, .130-131

Church of the Holy Trinity v. U.S.,
143 U.S. 457 (1892) .... 145 .....

Collins v. State Bev. Dept.,
239 S.2d 613, 616 163

Colorado v. Harvey, 491 P.2d 563, 564
(Dec. 6, 1971) 110

Crain v. State, 3 Ind. 193 (1851) .... 179 .....

Delta Book Distributors, Inc. v. Cronvich,
304 F. Supp. 662, 673 (July 14, 1969),
E.D. La., New Orleans Div.) Reversed on
other grounds in Perez v. Ledesma,
401 U.S. 82 (Feb. 23, 1971) .... 140-141 ..

Director General of Railroads v. Kastenbaum,
263 U.S. 25, 68 L.Ed. 146,
44 S.Ct. 52 (1924) .... 104 .....

Dixon, Billie, Richard Bright and Michael
McClure v. Mun. Ct. of City & County
of San Francisco, 267 Cal.App.2d 875,
73 Cal. Rptr. 587 (Dec. 2, 1968);
Hrg. den. Jan. 29, 1969 .... 158 .....

Draper v. U.S., 358 U.S. 307, 3 L.Ed.2d
327, 79 S.Ct. 329 (1959) .... 103-104 ..

East Village Other, Inc. v. Koota,
305 F.Supp. 1159, 1162 (Feb. 13, 1968) ..... 136 .....

Evans Theatre Corp. et al. v. Slaton,
Dist. Atty Fulton County, 227 Ga. 377,
180 S.E.2d 712 (Mar. 4, 1971) .... 147-158 ..

Evans Theatre Corp. et al. v. Slayton, Dist. Atty. of Fulton County, _____ U.S._____, 30 L.Ed.2d 267, ______S.Ct. (Nov. 9, 1971) 181

Evergreen Review, Inc. v. Cahn (EDNY 1964) 230 F. Supp. 498 136

Flack v. Anaheim Judicial Dist., 56 Cal. Rptr. 162, 165 (Feb. 3, 1967). 142

Flack v. Mun. Ct. of Anaheim, 56 Cal.2d 981, 429 P.2d 192, 59 Cal.Rptr. 872 (July 3, 1957) 110

Flack v. Anaheim Mun. Ct., 59 Cal. Rptr. (July 26, 1967) 142-143

Gable v. Jenkins, 397 U.S. 592, 25 L.Ed. 2d 595, 90 S. Ct. 351 (1970) 107

Ginsberg v. N.Y., 390 U.S. 629, 20 L.Ed.2d 195, 86 S.Ct. 942 170-171

Ginzburg v. U.S., 16 L.Ed.2d 38, fn. 12, p.39, fn. 14, p.41, fn. 19 168

Glass v. 8th Judicial Dist., 486 P.2d 1180, 1181 (July 2, 1971) 110

Grove Press, Inc. et al. v. Anthony B. Flask, 325 F. Supp. 574 (Mar. 10, 1970) . . . 183

Grove Press, Inc. v. Flask, Oct. Term 1970, No. 360 183

Harmer v. Tonylyn Productions, 100 Cal.Rptr. 576, 579 (Mar. 2, 1972) 163-164

Henry v. U.S., 361 U.S. 98, 102, 4 L.Ed. 2d 134, 138, 80 S. Ct. 168 (Nov. 23, 1959) . . 104

Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968); appeal dismissed in Holden v. Arneberg, 22 L.Ed.2d 112 (Mar. 3, 1969) 139, 143-144

Hosey v. City of Jackson, 309 F. Supp. 527, 534, fn. 9 (Jan. 22, 1970); vacated and remanded on jurisdiction in 401 U.S. 987, 28 L.Ed.2d 525, 91 S. Ct. 1221 . . . . . . 112, 128

Illinois v. Ridens, 282 N.E.2d 691, 695, (Mar. 21, 1972) 163

Jacobellis v. Ohio, 371 U.S. 808, 9 L.Ed.2d 52, 83 S.Ct. 28 (Oct. 8, 1962); 373 U.S. 901, 10 L.Ed.2d 197, 83 S.Ct. 1288 (Apr. 29, 1963) 2, 18

Johnson v. City of Rochester, Minn., 197 N.W.2d 244, 247 (Apr. 28, 1972) 110

Johnson v. U.S., 333 U.S. 10, 15, 92 L. Ed. 436, 441, fn. 5, 68 S.Ct. 367 (1948) 102, 103

Judson v. Zurhorts, 30 Ohio Cir. 9, 14 181-182

Kaplan v. U.S., 277 A.2d 477, 479 (May 10, 1971) 163

Ker v. California, 374 U.S. 23, 34, 10 L.Ed.2d 726, 83 S.Ct. 1623 (June 10, 1963) 102, 103, 130

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1967) 135, 136, 149, 177-178

Lee Art Theatre v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968) 122, 134

Longoria v. Texas, 479 S.W. 2d 689 (Feb. 16, 1972) 126-127

Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 470, 91 L.Ed. 422, 67 S.Ct. 374 .... 111, 148-149

Marcus v. Kansas City Search Warrants of Property, 367 U.S. 717 (1961) 135, 136

Marks v. State of Florida, 262 S.2d 479 (May 23, 1972) 163

Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968) 136, 138-139, 140

Milky Way Productions v. Leary, 305 F. Supp. 289, 295-297 (Oct. 16, 1967) 141

Minnesota, State of v. Getman, 195 N.W.2d 827, 829 (Mar. 17, 1972) 163

Mishkin v. N.Y., 16 L.Ed.2d 53, fn. 9 168

Missouri v. Hartstein, 469 S.W.2d 329, 332-334 (Apr. 12, 1971); reversed on other grounds in Hartstein v. Missouri, _____ U.S. _______, 30 L.Ed.2d 539, 92 S.Ct. _____ (Dec. 14, 1971) 109-110

Mitchum v. State of Florida, 244 S.2d 159, 160 (Jan. 26, 1971) . . . 163

Mitchum v. State of Florida, 251 S.2d 298, (Aug. 12, 1971) . . . 159-162, 163

Morris v. U.S., 257 A.2d 341 (Dec. 2, 1969) . . . 162-163

Mugler v. Kansas, 123 U.S. 623 (1887) . . . 169

New Jersey v. Osborne, 285 A.2d 43, 46 (D.C.Ct. of Appeals, Dec. 10, 1971) . . . 110

New York Feed Co. v. Leary, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817 (Feb. 27, 1970) . . . 141

New York v. Lake Ronkonkoma Theatre, 59 Misc.2d 438, 442 (Mar. 6, 1969) . . . 97-98

New York v. Morgan, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) . . . 110

North Carolina v. Bryant, 183 S.E.2d 824, 825 (Oct. 20, 1971) . . . 110

Ohio v. Albini, 31 Ohio St.2d 27, 28, 34 (July 5, 1972) . . . 106, 110, 114-

Ohio, State of, ex rel Ewing v. Without A Stitch, 57 Ohio Op.2d 184, 187 (July 9, 1971) . . . 146-147, 151

Ohio, State of, ex rel Keating v. Vixen, 272 N.E.2d 137, 140, 27 Ohio St.2d 278 (July 21, 1972) . . . 146-147, 151, 182

1024 Peachtree v. Slaton, 184 S.E.2d 144 (Oct. 7, 1971) . . . 147

People v. Lim, 18 Cal.2d 872, 118 P.2d 472, 476 (Nov. 27, 1941) . . . 184-185

People ex rel Hicks v. "Sarong Girls", 103 Cal.Rptr. 414, 416, 417 (Aug. 3, 1972) . . . 187-189

Potwora v. Dillon (CA2), 386 F.2d 74 (Nov. 14, 1967) . . . 136

Preston v. U.S., 376 U.S. 364, 367, 11 L.Ed.2d 777, 780, 84 S.Ct. 881 (Feb. 25, 1954) . . . 128

Rage Books, Inc. v. Leary, 301 F.Supp. 546, 549 (July 1, 1969) . . . 140

Redrup v. N.Y., 384 U.S. 916, 16 L.Ed.2d 438, 86 S.Ct. 1362 (Apr. 25, 1966) . . . 10

Redrup v. N.Y., 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967) 10

Rex v. Curl, 2 Strange 789 (1727) 167

Roaden v. Kentucky, 473 S.W. 2d 814 . . . . 97, 108, 109

Roth-Alberts 145, 149, 177

Roth v. U.S., 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) . . 114, 145, 149, 170

Schackman v. Arnebergh, 258 F.Supp. 983, 989-990 (Sept. 27, 1966) 110, 134

Schmerber v. Calif., 384 U.S. 757, 769, 16 L.Ed.2d 908, 918, 86 S.Ct. 1826 (June 20, 1966) 118

Scott v. Frey, 330 F.Supp. 365, 367 (E.D.La., N. Orleans Div., June 30, 1971) 110

Solesbee v. Balkom (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457; Rehrg. den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618 . . . 111-112, 149-150

Stanley v. Georgia, 394 U.S. 557, fn.10 . . . . . 168, 173

208 Cinema, Inc. v. Vergari, 298 F.Supp. 1175, 1177 (May 6, 1969) 140

Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857, 863 (Mar. 26, 1964) . . . 152-158

Trist v. Child, 21 Wallace 441, 450 (1874) 13-14, 169-170

Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) 137, 139

United Theatres of Fla. v. State ex rel Gerstein, 259 S.2d 210, 212 (Feb. 15, 1972) 164

U.S. v. A Motion Picture Film Entitled "491", 367 F.2d 889 (2d Cir. 1966) 137

U.S. v. A Motion Picture Film Entitled "Pattern of Evil," 304 F.Supp. 197, 199 (Sept. 2, 1969) 137

U.S. v. Brown, 274 F.Supp. 561, 565 (Oct. 18, 1967) 137-138

U.S. v. 18 Packages of Magazines, 238 F.Supp. 846 (N.D.Cal. 1964) 137

U.S. v. 56 Cartons of Magazines Entitled Hellenic Sun, 373 F.2d 615 (4th Cir. 1967) 137

U.S. v. Four (4) Books, 289 F.Supp. 972
at 973 (Sept. 10, 1968), p.4, fn. 4 169

U.S. v. Green, 284 A.2d 879, 882
(Dec. 20, 1970) 110

U.S. v. One Book Entitled "The
Adventures of Father Silas,"
249 F.Supp. 911 (SDNY 1966) 137

U.S. v. 37 Photographs, 402 U.S. 363,
28 L.Ed.2d 822, 91 S.Ct. 1400
(May 1, 1971) 137, 173, 175-177, 185

U.S. v. Reidel, 402 U.S. 351, 355, 28
L.Ed.2d 813, 817, 81 S. Ct. 1400
(May 3, 1971) 100-102, 173-175, 176, 177,

U.S. v. Wild, 422 F.2d 34 (Oct. 29, 1969),
cert. den. 402 U.S. 986, 91 S.Ct. 1644,
29 L.Ed.2d 152, rehrg. den. 403 U.S. 940,
91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1972) ... 163

U.S. v. Womack, 111 U.S. App. D.C. 8,
294 F.2d 204, cert. den. 365 U.S. 859,
81 S.Ct. 826, 5 L.Ed.2d 822
(Mar. 27, 1969) 163

Walter v. Slaton, 227 Ga. 676,
182 S.E.2d 464 (May 13, 1971) 147

Washington v. Rabe, 484 P.2d 917, 920
(Apr. 6, 1971); reversed on other
grounds in Rabe v. Washington, ____ U.S. ____,
31 L.Ed.2d 258, 92 S.Ct. ____ (Mar. 20, 1972) ... 110

Weis v. Superior Court of San Diego Cnty.,
30 Cal. App. 730, 159 P.464, 465
(June 14, 1916) 183-184

Whiteley v. Warden of Wyoming State
Penetentiary, 401 U.S. 560, 566, 28 L.Ed. 2d
306, 312, 91 S.Ct. 1031 (Mar. 29, 1971) 104

Wilhoit v. U.S., 279 A.2d 505, cert. den.
30 L.Ed.2d 546 (Dec. 14, 1971) 163

Wisconsin v. Kois, 188 N.W.2d 467, 471
(June 29, 1971) reversed on other grounds
in Kois v. Wisc., ____ U.S. ____, 33 L.Ed.2d
312, 92 S. Ct. ____ (June 26, 1972) 109-110

Wisconsin v. O'Connell, 192 N.W.2d 201,
205-206 (Dec. 14, 1971) 110

Youngstown, City of, Ohio v. DeLoreto, 251 N.E.2d 291, 48 Ohio Op.2d 393, 400 (Sept. 10, 1969) . . . . 146-147, . 150-151

CODES & STATUTES

29 Am. Jur.2d Sections 34, 114, 121, 143 . . . . 152 . . . .
28 U.S.C., Sections 2281-2284 . . . . 142, . . 183
Arizona Rev. Stat., Sect. 13-601 . . . . 180 . . . .
Ohio Revised Code, Sect. 3767.01 et seq. 182-183
6 C.J.S. – Arrests – Section 6, P.589 . . . . 103 . . . .
Rules of the U.S. Supreme Court, Rule 42(3) . . . . 1 . . . .

MISCELLANEOUS

1 Antineau, Modern Constitutional Law, p. 262 . . . 102 . . . .

Perkins, Rollin, on Criminal Law, Foundation Press, 1954, p. 336 . . . . 179 . . . .
Rollin Perkins, Elements of Police Science, Copyright 1942, Foundation Press, Inc., pages 44, 50, 250 . . . . 102, . 132-133
Schwartz, Louis B., Co-Reporter of Model Penal Code, 63 Columbia Law Review, Morals Offenses, pp. 671, 672, 681 . . 167-169 . . . . . .
4 Wigmore on Evidence (3rd Edition, 1940, Section 1179) . . . .
Witkin, California Evidence, Copyright 1958, page 5 . . . . 118-119 . . . .

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1043

SAUL HELLER

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

On Writ of Certiorari to the Court of Appeals
of the State of New York

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Respondent

Charles H. Keating, Jr.,(hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U.S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondent, The People of The State of New York.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation: first, as the founder and co-counsel for Citizens for Decent Literature, Inc., and more recently as a member of the Presidential Commission on on Obscenity and Pornography. Moving Party is also the appellee in an obscenity case pending before this Court, entitled, "*A Motion Picture Film Entitled 'Vixen', Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr.*, October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response.[1] The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

The grant of a writ of certiorari herein brings to this Court the first oral arguments involving the *review of a criminal conviction* for exhibiting an obscene motion picture film, since the grant of a writ of certiorari ten years ago in *Ohio v. Jacobellis.*[2] In Jacobellis, this Court reviewed the felony

---

[1] In Moving Party's response thereto, see Motion to Affirm at pages 13-18, this Court was urged to grant plenary review in the "Vixen" appeal for several reasons: 1. The appeal involved a civil matter and was limited to the obscenity vel non issue; and 2. the record presented ideal "facts" for review, which included (a) one of the defendants was Producer Russ Meyer, the "King" (and very first) of the pandering motion picture producers; (b) the testimony of defense witness, film historian Arthur Knight, who candidly traced the erosion which has taken place since Russ Meyer started it all, and Russ Meyer's participation therein: and (c) the testimony of plaintiff's witness, Dr. Melvin Anchell, a practicing psychiatrist and author of "Sex and Sanity," who very logically explained the psychiatric basis for the proscription of obscenity (and this Court's holding in Roth-Alberts, 354 U.S. 476, 485, that it was the universal judgment of civilized nations that obscenity should be restrained).

---

[2] Jurisdiction was first noted at the commencement of the 1962 October Term. *Jacobellis v. Ohio,* 371 U.S. 808, 9 L.Ed.2d 52, 83 S. Ct. 28 (Oct. 8, 1962). After argument without decision during that term, the case was restored to the docket. *Jacobellis v. Ohio,* 373 U.S. 901, 10 L.Ed.2d 197, 83 S. Ct. 1288 (Apr. 29, 1963). Reargument did not occur until late in the 1963 October Term (Apr. 1, 1964) with this Court's no-clear majority decision being handed

(This footnote is continued on the next page)

conviction of Nico Jacobellis, manager of the Heights Art Theater in Cleveland Heights, Ohio, for exhibiting the French imported, so-called "art" film, "Les Amants" (The Lovers) and examined the interdependent "obscenity" and "scienter" issues, which in the following years have continued to plague this Court.[3] Here in the *Heller* case, the

---

down on the last day of that term. ***Jacobellis v. Ohio,*** 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1672 (June 22, 1964).

The ***Jacobellis*** decision presents only the law of the case and is not a constitutional precedent which binds this Court. In that decision, Justices Warren, Clark and Harlan dissented and Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in ***Roth v. U.S.,*** 354 U.S. 476, 77 S. Ct. 1314, 1 L.Ed.2d 1498 (June 24, 1957), which holds obscenity legislation constitutional. Of the four remaining Justices, Justice White's vote without opinion can, with reason, be attributed to the criminal aspects of the case and the unfortunate fact that Jacobellis, as an alien and convicted felon, would be subject to a denial of citizenship. Compare Justice White's dissenting vote on the same day in the ***civil case, Grove Press, Inc. v. Gerstein*** (Tropic of Cancer), 378 U.S. 577, 12 L.Ed.2d 1035, 84 S. Ct. 1909 (June 23, 1964). Justice Stewart erroneously applied a "hard-core pornography" reasoning which this Court, in reviewing a state obscenity conviction in ***Mishkin v. New York,*** 383, U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held ***not*** to be the law.

[3] See, for example, the compromising result reached in the ***Redrup*** and ***Austin*** cases, cert. granted, limited to the "scienter" issue in ***Redrup v. New York,*** 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1968), and ***Austin v. Kentucky,*** 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1966), but decided on other grounds in a no-clear majority decision in ***Redrup v. New York,*** 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967).

The ***Redrup*** decision presents only the law of the case, and is not a constitutional precedent which binds this Court. In that decision, Justices Harlan and Clark dissented. Of the seven remaining Justices, Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in ***Roth,*** 354 U.S. 476, 1 L.Ed.2d 1949, 77 S. Ct. 1314 (June 24, 1957), which holds obscenity legislation constitutional. Of the five remaining Justices, Justice Stewart erroneously applied a "hard-core" pornography" reasoning which this Court, in reviewing a state obscenity conviction in ***Mishkin v. New York,*** 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held not to be the law in state cases.

obscenity issue is not so complex – only the obscenity vel non of the motion picture film "Blue Movie" is being litigated, and that in the context of "hard-core" materials,[3a] and without reference to the "mens rea" aspect of the obscenity crime.

Of equal importance to the "obscenity vel non" question is the broad issue which underlies petitioner's second ground for review – the claim of a right in theater operators and others to an adversary hearing on the obscenity issue before a seizure of a motion picture film may be made, either as an incident to an arrest or under a search warrant. In Moving Party's view, this defensive claim of a so called "right to an adversary hearing" has no sound basis in legal logic,[4] having

---

[3a] New York Penal Law Section 410.00(9), set forth herein at footnote 12, page 13 defines a "pornographic" motion picture as a motion picture showing "acts of sexual intercourse."

[4] As to the validity of Amicus' statement that there is "no sound basis in legal logic," see the shrewd observation of Justice Batjer, dissenting in *Glass v. Eighth Judicial District*, 486 P.2d 1180 (July 2, 1971) at 1189, regarding the anomalous result being reached:

> "In United States v. Wild, 422 F.2d 34 (2nd Cir. 1969), that court said: 'These cases (A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)), are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe Marcus and A Quantity of Books can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases.' Cf. Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where it was held that an adversary hearing is not a prerequisite to the validity of an arrest for obscenity. *Here, on theory, Erwin, Glass could have been arrested without a prior adversary hearing, locked up, and prevented from exhibi-*

(This footnote is continued on the next page)

literally emerged from out of nowhere. Encouraged by language of certain members of this Court, taken out of context from "prior restraint" cases, and nourished by this Court's silence on the matter when its voice was sorely needed that which began as a spurious claim has reached its zenith in its challenge herein to the power of the state judiciary to issue a search warrant upon an ex parte determination of "probable cause."[5]

The embroglio which has recently arisen between competing state and federal judiciary over the "adversary hearing" issue[6] has shepherded the entry of hard-core films into the

---

ting to the public his non-obscene materials, but following the majority opinion his two films 'Wanda,' the hypnotist, lashed into submission, for mature adults 'only,' and 'Title Withheld,' only for the mature adult who understands, must be granted an adversary hearing before they can be held. (Our emphasis.)

[5] Since the judiciary have the power to authorize an arrest of the *personal liberty* of a person upon an ex parte showing of probable cause, what is the common sense justification for a differentiation in the case of a search warrant to seize a positive film print (even granting it may be the only print in existence) which is alleged to be the mere instrumentality of the crime? *Are the "suppression powers"* of government *any less where personal liberty is concerned?* Or for that matter, are the corrective powers of the judiciary, on balance, any less in the case of a motion to restore subject matter wrongfully taken under the search warrant.

[6] During the four years of silence since *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968), brushfire wars have developed between the state and federal judiciary in practically every state in the Nation. Representative of this open warfare on this issue is the struggle taking place in the two pornography capitals of the U.S.A.

In the West, compare *California v. DeRenzy*, 275 Cal.App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969) and the California State rule, which permits a seizure under an ex *parte* search warrant where supported by affidavits which focus searchingly on the subject matter, with *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir., May 13, 1970), and the Federal Rule (9th Cir.) which requires an adversary hearing before *any* search warrant seizure; vacated and remanded

(This footnote is continued on the next page)

neighborhood theaters and drive-ins and presently acts as the guarantor for their remaining there. With local law enforcement neutralized by this issue, the subject matter regularly appearing on the public screens has hit the very lowest depths of depravity.

---

for reconsideration in the light of *Perez v. Ledesma,* 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (Mar. 29, 1971).

In the East, compare *New York v. Heller,* 29 N. Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and the New York State rule authorizing a seizure under an ex *parte* search warrant after a surreptitious viewing by a judge, certiorari granted by this Court in *Heller v. New York,* __ U.S.__, 32 L.Ed.2d 115, __ S.Ct. __ (May 15, 1972) with *Bethview Amusement Corp. v. Cahn,* 416 F.2d 410 (2d Cir. Oct. 6, 1969), requiring an adversary hearing before *any* seizure, certiorari denied 397 U.S. 920, 25 L.Ed.2d 101, 90 S.Ct. 929 (Feb. 24, 1970). Further, the result reached on appeal to the second circuit may very well depend upon the panel of judges hearing the case. Compare *Bethview, supra* (Hayes, Waterman, Bartels) which ordered the return of a film with *U.S. v. Wild,* 422 F.2d 34 (2nd Cir. Oct. 29, 1969) (Lumbard, Smith, Feinberg) which refused to disturb a conviction which was based upon evidence taken without an adversary hearing, rehearing denied 422 F.2d 38 (Feb. 2, 1970), cert. den. by this Court in 402 U.S. 986, 29 L.Ed.2d 152, 91 S.Ct. 1644 (May 17, 1971). For a variation of the rule in *Heller v. N.Y.,* which follows the Kentucky Court of Appeals decision in *Roaden v. Kentucky,* 473 SW2. 814 and authorizes an arrest without a warrant where hard-core films are concerned, see *New York v. Morgan,* 326 N.Y.S.2d 976 (Sept. 2, 1971); see also *New York v. O'Brien,* 320 N.Y.S.2d 425 (Apr. 7, 1971) where a trial court in Nassau County denied the district attorney's application for an adversary hearing prior to the issuance of a search warrant on the grounds that the New York law did not provide such a procedure. It would appear that in *Lido East Theatre Corp. v. Murphy,* 337 F.Supp. 1345 (Feb. 15, 1972) and the cases cited therein at footnote 8, the Federal District Court in the Southern District of New York has disregarded this Court's ruling in *Perez v. Ledesma,* 401 U.S. 82, 84 (Feb. 23, 1971) that:

> "The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see *Stefanelli v. Minard,* 342 U.S. 117 . . . ."

It is now a common thing for films such as "Animal Lover,"[7] "Deep Throat,"[8] "Sticky Situation,"[8] "School Girl,"[8] and "Adultery For Fun And Profit"[8] to screen without opposition in local communities throughout this nation. Given this state of confusion, it is not unrealistic to regard that historical fact (i.e. that such films are currently screening

---

[7] A time-motion study of the film "Animal Lover" appears hereinafter at Appendix C, pages 1-22. The experience of Denver County (Colo.) District Attorney Seccombe with this film and the "prior restraint" issue is a classic example of the confusion and disability suffered by law enforcement from that conflict. See *Colorado ex rel McDevitt v. Harvey* 491 P.2 563 (Dec. 6, 1971) where the Colorado Supreme Court, in interpreting the decisions of this Court, came to an opposite conclusion from that of the New York Court of Appeals in *Heller* and held, at page 564, that "Under the criteria laid down by the United States' Supreme Court in *A Quantity of Books v. Kansas*, supra, *which we are required to follow whether we agree with all facts of the case or not. . .*" (our emphasis), an adversary hearing was required before a film could be seized under a search warrant.

"Animal Lover" first appeared on the public screen in San Francisco and was immediately found to be obscene. (See *San Francisco Chronicle* news report of Jan. 16, 1971, a copy of which appears at Appendix J, Page 1.)

On July 18, 1972 the film was viewed by a Denver City police officer at the old Chelsea Theater, 1433 Tremont Place in Denver, who submitted an affidavit of what he saw on the public screen. On July 21, the affidavit was used as the basis for an ex parte order from Judge Manerbino allowing law enforcement to videotape the film. Thereafter, the videotape was exhibited to County Judge Weadick who set July 25th as a hearing date for the "adversary hearing." Following the "adversary hearing," Judge Manerbino issued the search warrant. When the police returned to execute the search warrant the film "Animal Lover" had left for parts unknown, (See Rocky Mountain news report of Aug. 27, 1972, a copy of which appears at Appendix J, page 2.) When the same procedure was followed as to other films in Sept. 1972, the film projection was stopped as the videotaping commenced, under the pretext that the film had broken, and thereafter a different film appeared on the screen. (See Denver Post of Sept. 26, 1972, copy of which appears at Appendix J, Page 3.) As a climax to this Keystone Cop scenario, in October of 1972 Denver District Court Judge Brooks, Jr. enjoined such evidence marshalling procedures, on the grounds that there was no legal basis for the videotape order. (See Boxoffice report of Oct. 16, 1972, a copy of which appears at Appendix J, page 4.) Compare the ruling of Denver Court Judge Brooks with that of Nassau County District Court Judge Donovan in *New York v. O'Brien*, supra at footnote 6, Amicus submits that this Court's rulings have law enforcement and the lower courts effectively chasing their tails.

---

[8] Time-Motion studies of "Deep Throat", "Sticky Situation" and "School Girl" appear at Appendix D, pages 1-28, Appendix E pages 1-31, and Appendix G, pages 1-32. The appearance of these films in the Nation's capitol is commented on in the Amicus Curiae Brief of Charles H. Keating, Jr. in *Paris Adult Theater v. Slaton*, No. 71-1051 at page 84-86 on file in this Court. A time-motion study of "Adultery For Fun And Profit" appears at Appendix F, pages 1-26.

When "Deep Throat" and "Sticky Situation" appeared in New York City in Aug. of 1972, (See New York Times Movie Ad of Aug. 10, 1972 at Appendix J page 10 and 11), Judge Rosenberger viewed the same and, under the New York Court of Appeals decision in *Heller v. New York* 277 N.E2 651 (Dec. 1, 1971), issued search warrants under which both films were seized. Later, Judge Rosenberger countermanded his order upon the urging by defense counsel that, notwithstanding the State court *Heller* ruling, a prior adversary hearing was required by the federal decisions in the second circuit. Thereafter the public screening of "Deep Throat" resumed at the World Theater at 153 West 49th Street, which the Times notes is two doors east of a church, the Times Square chapel of the Salvation Army. (See New York Times report of Aug. 20, 1972, a copy of which appears at Appendix J, page 5.) As recent as Oct. 25, 1972, the recorded telephone ad for the World Theater (212-Ci-75747) announced "We continue our policy of bringing you first run, hard action, 35 mm features and 16 mm featurettes. We are presenting the World Premier of "Deep Throat," Screw Magazine has given "Deep Throat" 100% on the Peter Meter and it has been called the best porno film ever made. "Deep Throat" can be seen daily, starting at 10:00 A.M. . . (with the final performance starting at 11:50 P.M."

Amicus submits that there is no rational reason for not applying in such state cases the same standards governing "prior restraint" as were laid down in *U.S. v. Thirty-Seven (37) Photographs* 402, U.S. 363, 28 L.Ed.2, 822, 91 S.Ct. 1400 (Mar. 3, 1971) with respect to the federal jurisdiction and the federal laws restricting the importation of obscenity in the United States. With the state of confusion of the state and federal judiciary being what it is in the New York jurisdiction, it is time for this Court to reaffirm its statement in *Roth-Alberts*, 354 U.S. 476, 484, 1 L.Ed.2, 1498, 77 S.Ct. 1304 (June 24, 1957) that ". . . implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is

(This footnote is continued on the next page)

without opposition) as a major scandal of this Court's making.[9]

---

mirrored in the universal judgment that obscenity should be restrained. . ." (our emphasis). Sounding as it does in bedrock truth, its positive affirmation that all civilized nations proscribe obscenity would do much to realign our judicial thinking and displace such false notions to the contrary.

[9] Certain members of this Court have, from time to time, spoken deridingly of the so-called "censors." See, for example, Justice Douglas' dissenting in *Ginsberg v. New York* 390 U.S. 629, 655, 20 L.Ed.2 195, 213, 88 S.Ct. 1274 (Apr. 22, 1968).

> "Censors are, of course, propelled by their own neuroses. That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. *Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.* That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. (our emphasis)"

But doesn't Justice Douglas' sword have a double edge? Should not the above sentence more properly read "Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers *or defenders* of it." (our emphasis) In the light of this Court's treatment of nisi prius determinations during the past 10 years, isn't it entirely realistic to say that the real "censors" are those individual justices who have attempted to impress their minority views against the will of government and thereby supress the "voice" of the people "speaking" through their legislatures and the jury system? On this latter point, see Justice Learned Hand speaking in ***U.S. v. Levine*** 83 F.2 156, 157 (1936), a criminal prosecution for mailing obscene circulars, wherein he called the verdict on obscenity a small bit of legislation ad hoc, like the standard of care which the Court imposses upon a jury as a duty. See also Justice Hand's comment in Bill of Rights, Harvard University Press (1958) at p.72 and 73 wherein he viewed a court's usurpation of this inherent right of the people as an evil: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not. . ." On this matter, can Justice Stewart reconcile his opinion, published in *Volanski v. U.S.* 246 F.2 842, 845 (June 7, 1957), before he ascended to this Court, adopting Learned Hand's views, with his

(This footnote is continued on the next page)

The Redrup "result" and the "prior adversary hearing" debates, both of which present issues herein, have been fused by defense attorneys into a modern defense mechanism which has completely decimated the people's defenses against lewd displays in public motion picture houses[10]. In its effort to bolster those defenses, and to halt the "spinning of wheels" which has occurred in the people's efforts to

---

currently held, more personal views. In *Volanski* he described in detail the subject matter under review as:

> "Each set of the pictures in question consists of twelve photographs of a young woman in various poses and various stages of undress. In none of the frontal views is the subject totally unclothed below her waist. In some of the posterior views she is. The photographs are without even tenuous pretensions to artistic or scientific merit. They are unaccompanied by any text. Although some of the poses are rather bizarre, no subject is shown engaged in any indecent or immoral activity."

and, quoting at length from Justice Hand's opinion in *U.S. v. Levine* (supra), held "The question in our opinion is peculiarly one best left for *nisi prius* determination, preferably by a jury. . ." In *Jacobellis v. Ohio* 378 U.S. 184, 197, 12 L.Ed.2, 793, 804, 84 S.Ct. 1676 (June 22, 1964) he stated from this Court, in reversing the Ohio Judiciary: "I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it and the motion picture involved in this case is not that."

[10] State prosecutors, out of sheer frustration, are refusing to pursue approved state judicial procedures, and are abandoning the enforcement of obscenity laws — laws which were duly enacted by the people's representatives, are clearly constitutional, and, considering the offerings on today's market, patently in point. Representative of this calamitous state of affairs is the situation presently existing in Rochester, New York. On March 18, 1972, Monroe County law enforcement commenced judicial proceedings under the *Heller* rule against the film "Adultery For Fun And Profit" exhibited at the Monroe Theater. (See time-motion study at Appendix F.) After a surreptitious viewing by City Court Judge Carl R. Scagchetti and Assistant District Attorney Howard R. Relin, the film was

marshal its evidence in obscenity litigation, New York law enforcement has retreated to what it regarded as a "safe" defensive position,[11] under which the state trial judges resort to dirty movie houses to review, in a surreptitious manner, the subject matter being displayed on the public screen, before issuing the search warrant which will bring the motion picture print into the court's custody for courtroom litigation. To make doubly certain of success in this "end around run" to the existing confusion, an arrest warrant is employed and law enforcement *also* proceeds under its historic authority to seize the instrumentality of the crime which is in the immediate area, incident to the arrest. *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2, 685, 89 S.Ct. 2034 (June 23, 1969).

Moving Party submits that the super-cautious procedure resorted to herein, demeans the authority of the judiciary by

---

seized (1) as an incident to the execution of an arrest warrant, and (2) under the authority of a search warrant, specifically naming the film. (See Rochester Democrat and Chronicle, dated March 18, 1972, a copy of which appears herein at Appendix J, page 6.) On July 7, 1972 Federal District Judge Harold P. Burke ordered the film returned. (See Rochester Democrat and Chronicle dated July 7, 1972, a copy of which appears herein at Appendix J, page 7.) In this frustrating situation, (see footnote 6) the Monroe County district attorney not only has refused to appeal the federal ruling, but has also refused to take any further steps against similar hard-core exhibitions being exhibited in that city as a steady bill of fare. The flood gates are open wide in that and most other New York cities. When "Adultery For Fun And Profit" was seized on March 18, 1972, the film "School Girl" (see time-motion study of "School Girl" at Appendix G) was publicly acknowledged to be playing in Rochester at the Riviera Theater. (See Appendix J, page 6, and the Rochester Democrat and Chronicle movie ad of March 18, 1972, a copy of which is attached at Appendix J, page 8.) On August 4, 1972, it was enjoying an unopposed, lengthy run at the Coronet Theater in Rochester. (See the Rochester Times-Union movie ad of August 4, 1972, a copy of which appears at Appendix J, page 9.)

[11] As the law functions today, there is no "safe" position. See footnote 6.

involving it in non-judicial functions, arrives at an extraordinary result which is without precedent in Anglo-Saxon law, and confuses the line of demarcation in the separation of powers which must exist between those who administer the law and those who interpret the law. If given recognition by this Court it will record as a judicial monument, a moment in our legal history which is better forgotten. Although respondent's brief has opted for an affirmance based solely upon the precautionary search warrant procedures resorted to by New York law enforcement, it is Moving Party's submission that the Court should employ a different approach and consider first, the arrest warrant procedure employed herein and the attending authority of law enforcement, at the time of the arrest, to seize a motion picture print used to project obscene pictures, as the instrumentality of the alleged crime.

Before this Court considers the search warrant procedures, it should first resolve the question as to whether a search warrant was necessary in the first instance. If no search warrant was necessary, the Court need never cross the *Heller* bridge. It seems clear from other decisions of the New York Court of Appeals that, given the opportunity, that Court would have written a different opinion, had the issue been presented and had they contemplated that other avenues were open to them under this Court's prior Rulings. See *New York v. Finkelstein,*[12] 218 N.Y.S.2d 341, 345, *New York v. Matherson,*[12] 16

---

[12] In *New York v. Matherson,* 16 N.Y.2 509 (Apr. 22, 1965) the New York Court of Appeals held at page 511:

> "Judgment affirmed. The seizure of evidence upon which the conviction is based was an incident to a lawful arrest on sufficient cause in a place open to public access. Therefore, the fact a search warrant was defective, as the People concede, because it was a general warrant (cf. *Marcus v. Search Warrant,* 367 U.S. 717; *Stanford v. Texas,* 379 U.S. 476) did not

(This footnote is continued on the next page)

N.Y.2d 509, 511 (Apr. 22, 1965), *New York v. Peskin*, 16 N.Y.2d 511, 512 (Apr. 22, 1965). There is no reason for believing they would not follow the majority view in this area. See Amicus Brief at page 109.

This Court is sorely in need of a moral voice in the tradition of the late Associate Justice Noah H. Swayne of the United States Supreme Court:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the

---

preclude the reception in evidence of exhibits seized as an incident to the arrest.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Van Voorhis, Burke, Scileppi and Bergan.

Not withstanding this Court's refusal, 10 years ago, to equate obscene materials with the pure food laws, gambling paraphernalia and other contraband, see *Marcus v. Kansas City Search Warrants* 367 U.S. 717, 6 L.Ed.2, 1127, 1135, 81 S.Ct. 1708 (June 19, 1961) a different case is presented where the New York legislature has specifically declared that the depiction of sexual intercourse on the motion picture screen *is* pornography and *is* contraband. (With certain exceptions not here applicable.) See New York Penal Law Section 410.00 (1) and (9) which provide for the forfeiture of motion picture prints used for "projecting . . . pornographic . . . motion pictures" and which specifically provides:

> "9. For the purposes of this section only, a pornographic still or motion picture, is defined as a still or motion picture showing acts of sexual intercourse or acts of sexual perversion. This section shall not be construed as applying to bona fide medical photographs or films . . ."

See also, Justice Bergan, author of the Heller opinion, speaking for the Supreme Court, Appellate Division, Third Dept. in *New York v. Finkelstein*, 218 N.Y.S. 2d 341 (Aug. 1, 1961) at 345:

> "One brief, for the first time, raised the issue of an illegal search and seizure of the book "Bloomer Boy," which was seized as an incident to the arrest of one of the defendants, and asks for a hearing before a decision. This application is not timely or properly made, would serve no purpose *since the seizure was of contraband incident to a lawful arrest, and is denied.*" (Our emphasis.)

> voice of universal history. The theory of our Government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. . . ." Associate Justice Noah H. Swayne speaking in *Trist v. Child*, 21 Wallace 441 (1874).

or Justice Radcliffe of the Ohio Supreme Court:

> "There is an oft-quoted cliche to the effect that it is not possible to legislate in the field of morals. The statement originally was and still should be 'it is not possible to legislate morality for the people.' We sorrowfully agree that this is so, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the Government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citius tolerare vult privatum

> damnum quam publicum malum (The law will rather permit a private loss or damage than a public evil)." Justice Radcliffe speaking for the Supreme Court of Ohio in *Ohio v. Jacobellis*, 173 Ohio St.22, 179 N.E.2d 777 (Jan. 17, 1962).

or the late Justice W. Turney Fox of the California District Court of Appeal:

> "The effect of such 'literature' is to dull the moral sensitivity of many, if not most of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetities and cast aside decent standards of behavior." Justice Fox speaking for the District Court of Appeal in *People of the State of California v. Williamson*, 24 Cal. Rptr. 734 (Sept. 26, 1962).

or the late Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court:

> "Prohibition against obscenity is not only a matter of cleanliness and godliness; the health of the community is involved. It has been established in thousands of cases that there can be a direct connection between abnormal sex books and sex crimes. Those who profess not to see this connection are either abysmally ignorant or refuse to accept the truth. . . .
>
> "Why have there been laws against obscenity reaching back into the days of antiquity? It is because ob-

> scenity, lewdness, lasciviousness strikes at the very moral fibre of the people and, when that disintegrates, a nation perishes. Justice Harlan said in the Roth-Alberts case . . . that 'the state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.' We know that Rome was great and went into decline; that Greece was the flower of culture, and that weeds finally grew in the Acropolis; that the Persian, Egyptian, Babylonian and numerous other civilizations were powerful, rich and indominable but something happened to them and they moldered into decay, not because of armed invasions from without their gates, but from moral deterioration within their own walls. . . ." Associate Justice Michael A. Musmanno dissenting in *Commonwealth of Pa. v. Dell Publications, Inc.*, 233, A2, 840, (June 29, 1967).

For lack of the same, we find the rankest order of obscenity inundating this Nation and reproducing itself out of the fission set into motion by this Court's obscenity decisions. The demoralizing force that obscenity exudes is everywhere. It fills our novels, paperbacks, still pictures, magazines and phonograph records, and has spilled over into and flooded our motion picture films, drama, radio, television, beer bars, nightclub acts, campus dialogue and campus newspapers.

That films, such as are before this Court, should be countenanced by the judiciary of this "Judaeo-Christian" culture is autoptical evidence that we are presently pursuing the moral standards of biblical Sodom and Gomorrah. The suggestion heard during oral arguments in *Paris Adult Theatre v. Slaton*, No. 71-1051, with the apparent acceptance of several members of this Court, that one approach would be to make such subject matter available to consenting adults, is but further proof along that line. Moving Party submits that by such responses, we continue to broadcast to the world our present worth, not as the free, moral people we have always prided ourselves as being, but rather as a nation of "slobs" which is about to succumb as the natural consequence of our own degeneracy.[13]

In Moving Party's view, this nation is facing a moral crisis. In granting review to eight obscenity cases, this Court has finally fixed the focus. Moving Party submits that the real import of these appeals[14] will be apparent only to those members of this Court who are willing to recall to mind from memory the vastly superior state of public morality (sexual) which existed when *Jacobellis* was decided just one short dedade ago. It is an unfortunate fact that when one dwells for too long a period in a dung heap, the reminiscent smell of fresh air has a way of escaping his memory.[15] Without invoking that reference, the full significance of these appeals will be lost, together with the opportunity for "greatness" which such decisions offer this Court. It is not exaggeration to urge this Court that the results reached therein, and the rationale employed in arriving at those results, will either provide the foundation upon which our moral structures may be rebuilt, or will further excavate the grave of depravity into which this Nation is sure to tumble. The present fate of this Nation is in the hands of the individual members of this Court.[16]

---

[13] "In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systemized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive glob of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless mediation but in flashing, thrashing activity." *–Hon. E. Barrett Prettyman, retired Chief Judge, U.S. Court of Appeals, in a speech at Law Day observances, 1962, at The Pentagon.* Reported in Case and Comment, March-April 1963.

[14] U.S. v. 12-200 foot reels of super 8 mm film, No. 70-2
U.S. v. Orito, No. 70-69.
Miller v. Calif. No. 70-73.
Heller v. New York, No. 71-1043.
Paris Adult Theatre v. Slaton, No. 71-1051.
Roaden v. Kentucky, No. 71-1134.
Alexander v. Virginia, No. 71-1315.
Kaplan v. California, No. 71-1422.

---

[15] See the observations of Federal District Judge Peirson Hall, speaking on "The Monster Vice" in *U. S. v. Four (4) Books*, 289 F.Supp. 972 at 973 (Sept. 10, 1968):

"'Vice is a monster of so vile a mien,
As, to be hated, needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.[1]'"

"The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood news stands and bookracks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity' . . . ."

[1] From Alexander Pope's "Essay on Man."

[16] In the introduction of his book, "Jews, God and History," Max I. Dimont discusses the eight basic ways of viewing history, the last two of which he expresses as follows at page 20:

> "The 'cult of personality' is the seventh face of history. Proponents of this school hold that events are motivated by the dynamic force of great men. If not for Washington, they say, there would have been no American Revolution; if not for Robespierre, there would have been no French Revolution; if not for Lenin, there would have been no Russian Revolu-

(This footnote is continued on the next page)

Moving Party therefore respectfully requests that he be granted leave to file a brief amicus curiae setting forth arguments on the jurisdictional questions posed herein and other related matters, for such assistance as they may provide to the individual justices sitting herein.

Dated: November 10, 1972.

Charles H. Keating, Jr.
Amicus Curiae

---

tion. Men create the events, claim these historians, in contrast to the economic interpreters who insist on the exact opposite, that events create the men.

"The eighth face of history, the religious, is both the oldest and newest concept. The Bible is the best example of this type of historical writing in the past. This way of viewing history looks upon events as a struggle between good and evil, between morality and immorality. Most Jewish history, until recent times, has been written from this viewpoint . . . .

". . . Martin Buber holds that the central theme running through their history is the relation between the Jew and his God, Jehovah. In the Jewish religious view of history, God has given man freedom of action. Man, as conceived by the Jewish existentialists, has the power to turn to God or away from God. He can act either for God or against God. What happens between God and man is history. In the Jewish way way of looking at things, success in an undertaking, for instance, is not viewed as blessed by God. A man may arrive at power because he was unscrupulous, not because God aided him. This leaves God free to hold man accountable for his actions – both successes and failures."

This Nation, with its roots inextricably woven in our Judaeo-Christian background, is at a crossroads, and in danger of tobogganing toward destruction in the face of the warning words of Presiding Justice Turney Fox in *California v. Williamson*, 207 Cal. App. 2d, 838, 24 Cal. Rptr. 734 (Sept. 26, 1962) (Paperback book, Fear of Incest), cert. den. in *Williamson v. California*, 377 U.S. 994, 12 L.Ed.2d 1047, 84 S. Ct. 1902 (June 22, 1964) rehearing denied in 379 U.S. 871, 13 L.Ed.2d 77, 85 S. Ct. 13 (Oct. 12, 1964) that "other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior." Moving Party submits that the judgment of the individual members of this Court will have its dynamic force in one direction or the other and that, in truth, men do create the events.

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1043

SAUL HELLER

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

On Writ of Certiorari to the Court of Appeals
of the State of New York

Brief Amicus Curiae of Charles H. Keating, Jr.,
In Support of Respondent.

STATEMENT OF THE CASE

A. BACKGROUND.

On July 29, 1969, Deputy Inspector Charles Smyth, New York State Police Department, attended a performance at the Garrick Theatre in Manhattan with Inspector Rockwell and Lt. Sullivan of Manhattan South, where they viewed the motion picture film "Blue Movie" (18a, 19a). On the following day

Richard Beckler, Ass't. District Attorney of New York County viewed "Blue Movie" at the same theatre (13a). Acting upon an oral request by Ass't. District Attorney Richard Beckler, Judge Goldberg of the Criminal Court of the City of New York, also attended a performance at the Garrick Theatre on July 31, 1969 (12a). Deputy Inspector Smyth accompaning the Judge and purchased the tickets. About 100 other persons were in the theatre. (19a)

Judge Goldberg saw the entire movie, which ran from 3:40 P. M. until about 5:15 or 5:20 P. M. A few minutes later, at approximately 5:25 P. M., Judge Goldberg signed warrants of arrest. (10a) The arrest warrants were issued upon a sworn complaint affidavit signed by Inspector Smyth which was submitted to the Judge immediately after the movie. The arrest warrants which the Judge signed were formal bench warrants in which the Judge struck out the word "Clerk" and put his name thereon (11a). No discussions were had while the Judge was observing the picture (14a), except that at one point Judge Goldberg asked the Inspector, how much longer the film had to run. (15a) Smyth had accompanied Judge Goldberg to the movie at the request of the District Attorney. At the conclusion of the performance, Smyth asked the Judge if he felt the film was obscene (20a). Judge Goldberg signed the arrest warrants because in his opinion, the film was obscene under New York Penal Law Section 235.00 (10a).

Neither the Judge nor the Inspector recalled any signs restricting admission to adults (13a, 30a). No one at the theatre was notified or consulted prior to the issuance of the warrants (17a).

The three arrest warrants signed by Judge Goldberg were also search warrants giving the police officers the right to search for the film (21a). As soon as Judge Goldberg signed the warrants, Smyth went back into the theatre and placed the manager, projectionist and ticket taker under arrest and seized the film (three reels) which was in the projection room (21a). At the time the film was taken he talked to the projectionist who was arrested (28a, 1a). The three reels were the only property taken at the time of the arrest (21a). At the time the three reels were taken into custody, one of the reels was still in the projector in the projection room and two were lying next to it.

A formal complaint (blue complaint) was drawn up that evening following the arrests (1a). Smyth had the reels vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office where it remained until August 26, when Smyth picked the same up (28a). The three reels were in the possession of Smyth from August 26th until their introduction into evidence (28a). While in his possession, he stored them in his locker which was secured by his private lock (28a).

Defendants were arraigned on the charge on the same date, July 31, 1969. On August 19th, defendants appeared by attorney and pleaded not guilty and requested a 3-judge panel. At that time defendants waived the preliminary hearing and all motions (1a). The case was continued to Sept. 4th and to Sept. 16th when all three defendants appeared for trial. On that date, the charges against Susan Epstein, the ticket taker, and Art Kern, the projectionist, were dismissed on the grounds that the People would be unable to prove their guilty knowledge beyond a reasonable doubt (5a).

A. The Trial.

The film, "Blue Movie," was exhibited to the court (35a, 37a). Time-motion studies of the subject matter appearing in that film appear hereinafter at pages 26 to 60 for this Court's examination.

The People's proof at trial consisted of the testimony of Judge Goldberg who testified to the circumstances surrounding his viewing of the film and the issuing of the arrest warrants, and the testimony of Inspector Charles Smyth concerning the viewing of the film, the arrests and the seizure. There was a stipulation that the film which was viewed by the Court was the same one which Judge Goldberg saw on July 31, 1969 (18a). The defense offered 3 witnesses, Parker Tyler a 65-year old author of six books about motion pictures, Charles Winick a 47-year old professor of sociology at the City University of New York, and Thomas Phillips, a 27-year old writer for radio station WQXR. The defendant, Saul Heller, also testified.

1. Plaintiff's Case in Chief.

On direct examination by Richard Beckler, Ass't. District Attorney, of New York County, Judge Arthur H. Goldberg, Judge of the Criminal Court, City of New York, testified as to the circumstances surrounding his viewing of the film and issuing of the arrest and seizure warrants. He stated that on July 31, 1969, at approximately 3:40 P.M., he had occasion to view the film, "Blue Movie" in its entirety at the Garrick Theatre on Bleeker Street in Greenwich Village, New York. He stated that the film ran from 3:40 until about 5:15 or 5:20, after which, at about 5:25, he signed a warrant of arrest (10a). The arrest warrant was a John Doe warrant (10a). He stated that, in his opinion, the film was obscene under the definition of "obscene" in Section 235.00 of the New York Penal Law (10a). Immediately prior to the issuance of the arrest warrant, a sworn affidavit complaint was submitted to him by Inspector

TIME-MOTION STUDY* OF MOTION PICTURE FILM "BLUE MOVIE"**

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**(Exhibited at Garrick Theater, 152 Bleeker St., New York City, in the Greenwich Village Section, and held to be hard-core pornography by the New York Court of Appeals in *New York v. Heller,* 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971)).

"BLUE MOVIE"
(Part 1 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

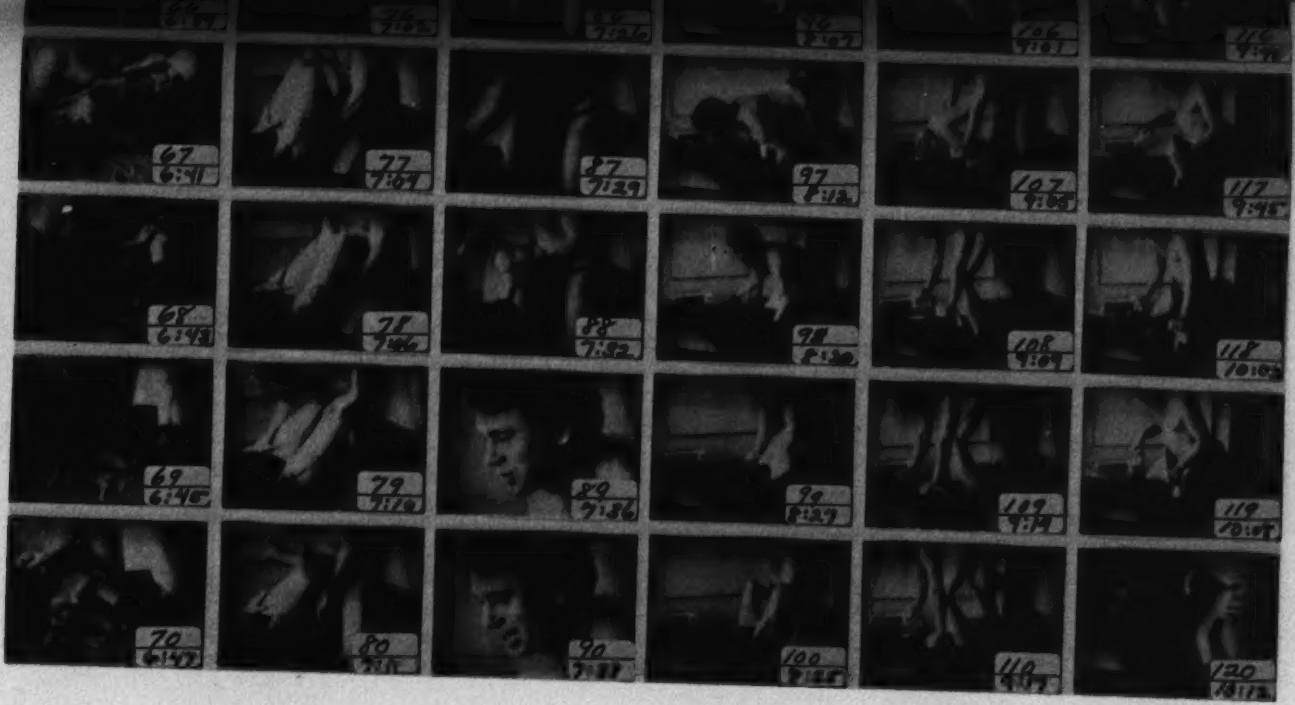
1
2
16
3
21
4
35
11
1:40
12
1:48
13
1:50
14
1:57
21
3:03
22
3:12
23
3:18
24
3:19
31
32
4:21
33
4:24
34
4:29
41
4:57
42
5:02
43
5:04
44
5:06
51
5:55
52
6:01
53
6:06
54

46 5:14
56 6:16
7 1:08
17 2:28
27 3:48
37 4:42
47 5:22
57 6:15
8 1:17
18 2:35
28 3:56
38 4:44
48 5:27
58 6:21
9 1:26
19 2:44
29 4:06
39 4:48
49 5:34
59 6:24
10 1:34
20 2:53
30 4:11
40 4:55
50 5:48
60 6:26

"BLUE MOVIE"
(Part 2 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

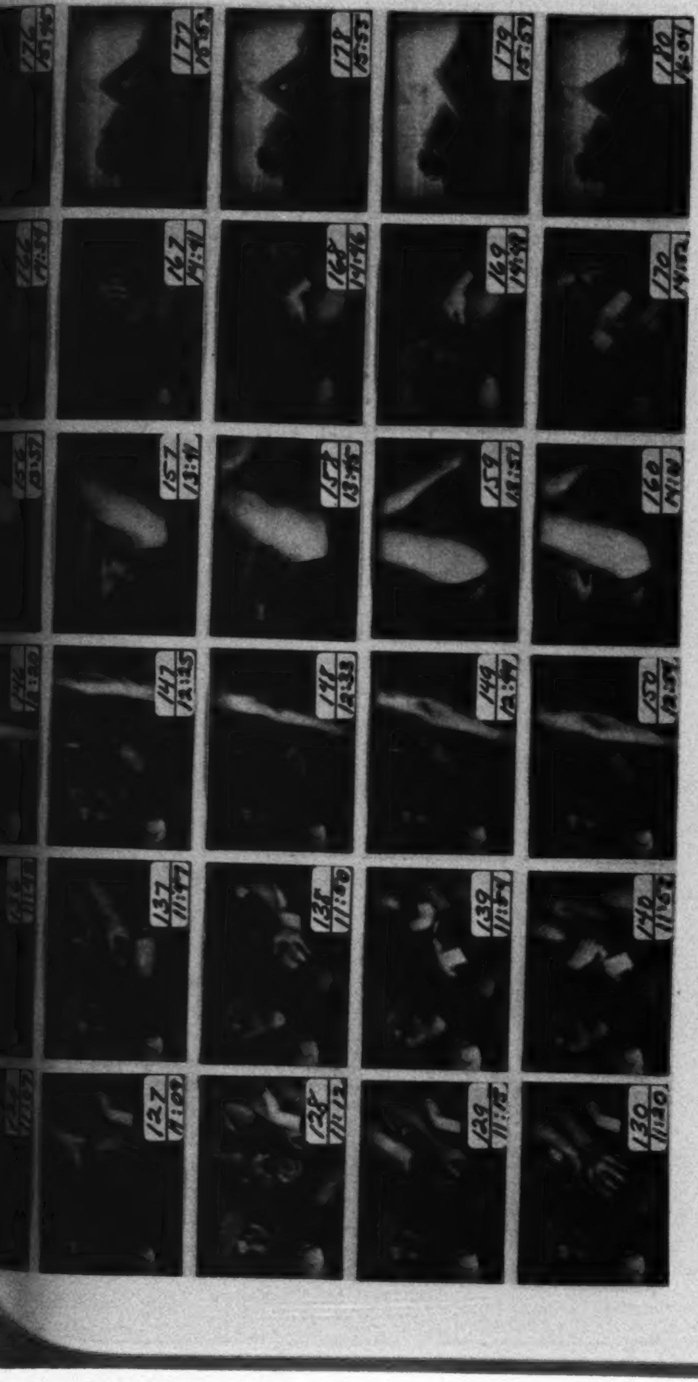
61
71
6:51
81
7:42
91
7:48
101
8:40
111
62
72
6:54
82
7:14
92
7:46
102
112
63
6:32
73
83
7:17
93
7:51
103
8:49
113
64
6:34
74
6:57
84
7:19
94
7:57
104
8:52
114
9:31


67 6:41
77 7:04
87 7:29
97 8:12
107 9:05
117 9:45
68 6:43
78 7:06
88 7:32
98 8:20
108 9:09
118 10:03
69 6:45
79 7:10
89 7:36
99 8:29
109 9:14
119 10:07
70 6:47
80
90
100 8:35
110
120 10:12

"BLUE MOVIE"
(Part 3 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

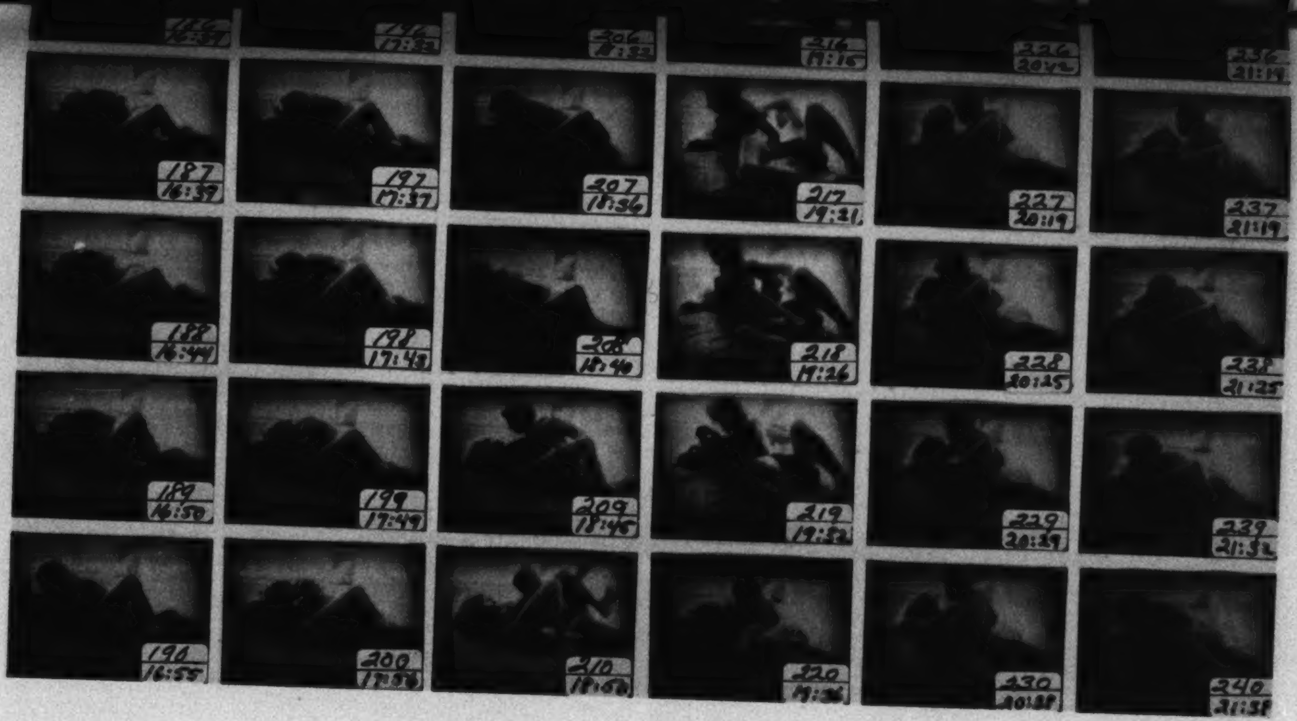
121
131
11:24
141
12:01
151
13:02
161
14:07
171
122
132
11:27
142
152
13:11
162
14:15
172
15:05
123
10:48
133
11:31
143
153
163
14:19
173
15:18
124
134
144
12:12
154
13:23
164
14:24
174
15:26


177
178
179
180
167
168
169
170
157
158
159
160
147
148
149
150
137
138
139
140
127
128
129
130

"BLUE MOVIE"
(Part 4 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

181
16:08
191
17:01
201
18:04
211
18:55
221
19:45
231
20:44
182
16:13
192
17:06
202
18:10
212
19:00
222
19:50
232
20:51
183
16:19
193
17:14
203
18:16
213
19:04
223
19:55
233
20:57
184
16:24
194
17:22
204
18:22
214
19:08
224
20:01
234
21:03


216
19:15
226
20:12
236
21:19
187
16:39
197
17:37
207
18:36
217
19:21
227
20:19
237
21:19
188
16:44
198
17:43
208
18:40
218
19:26
228
20:25
238
21:25
189
16:50
199
17:49
209
18:45
219
19:32
229
20:29
239
21:32
190
16:55
200
17:54
210
18:50
220
19:36
230
20:38
240
21:38

"BLUE MOVIE"
(Part 5 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

241 21:43
251 22:51
261 24:04
271 25:02
281 25:29
291 26:30
242 21:52
252 22:58
262 24:09
272 25:03
282 25:53
292 26:36
243 21:57
253 23:02
263 24:19
273 25:07
283 25:38
293 26:43
244 22:06
254 23:09
264 24:29
274 25:08
284 25:43
294 26:49

296
297
27:03
298
27:06
299
27:09
300
287
288
26:11
289
290
277
25:14
278
25:17
279
25:20
280
267
268
269
270
257
258
259
260
247
248
249
250

"BLUE MOVIE"
(Part 6 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

301
311
321
331
341
351
302
312
322
332
342
352
303
313
323
333
343
353
304
314
324
334
344
354

357
358
359
360
347
348
349
350
337
338
339
340
327
328
329
330
317
318
319
320
307
308
309
310

"BLUE MOVIE"
(Part 7 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

361
371
381
391
401
411
362
372
382
392
402
412
363
373
383
393
403
413
364
374
384
394
404
414

367
34:27
377
35:37
387
36:37
397
37:12
407
37:44
417
368
34:32
378
35:44
388
36:42
398
37:20
408
37:47
418
369
34:40
379
35:57
389
36:52
399
37:28
409
37:50
419
370
380
390
400
410
420

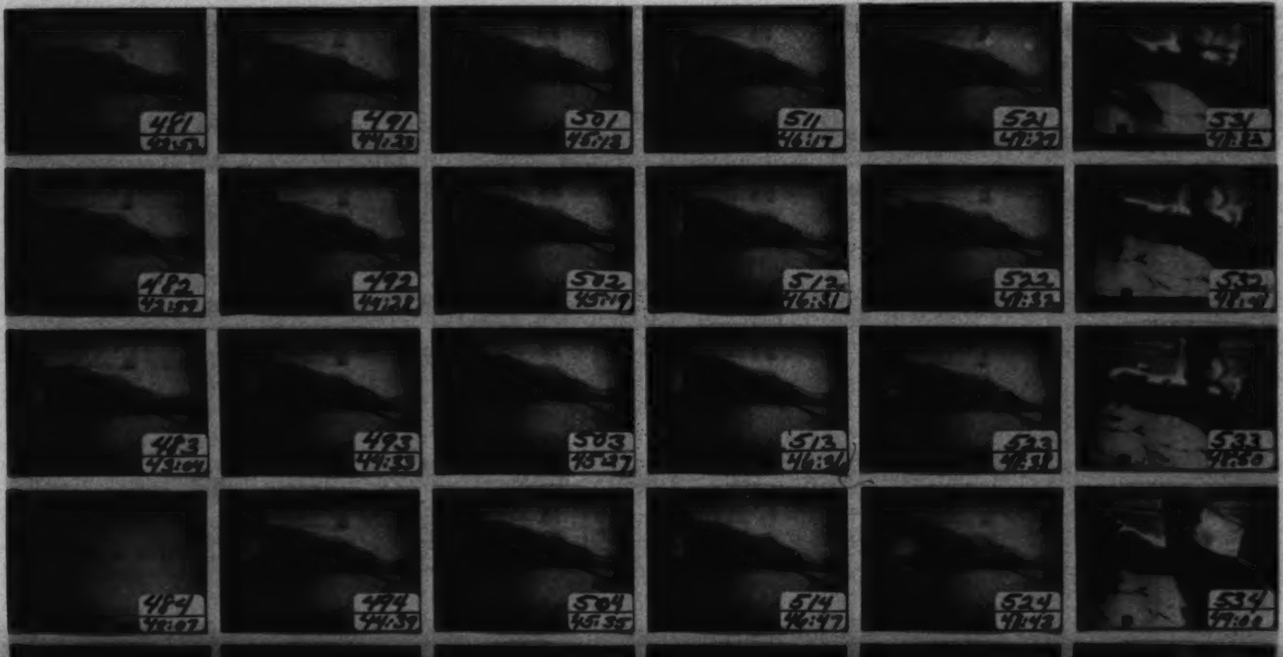
"BLUE MOVIE"
(Part 8 of 18 Parts)

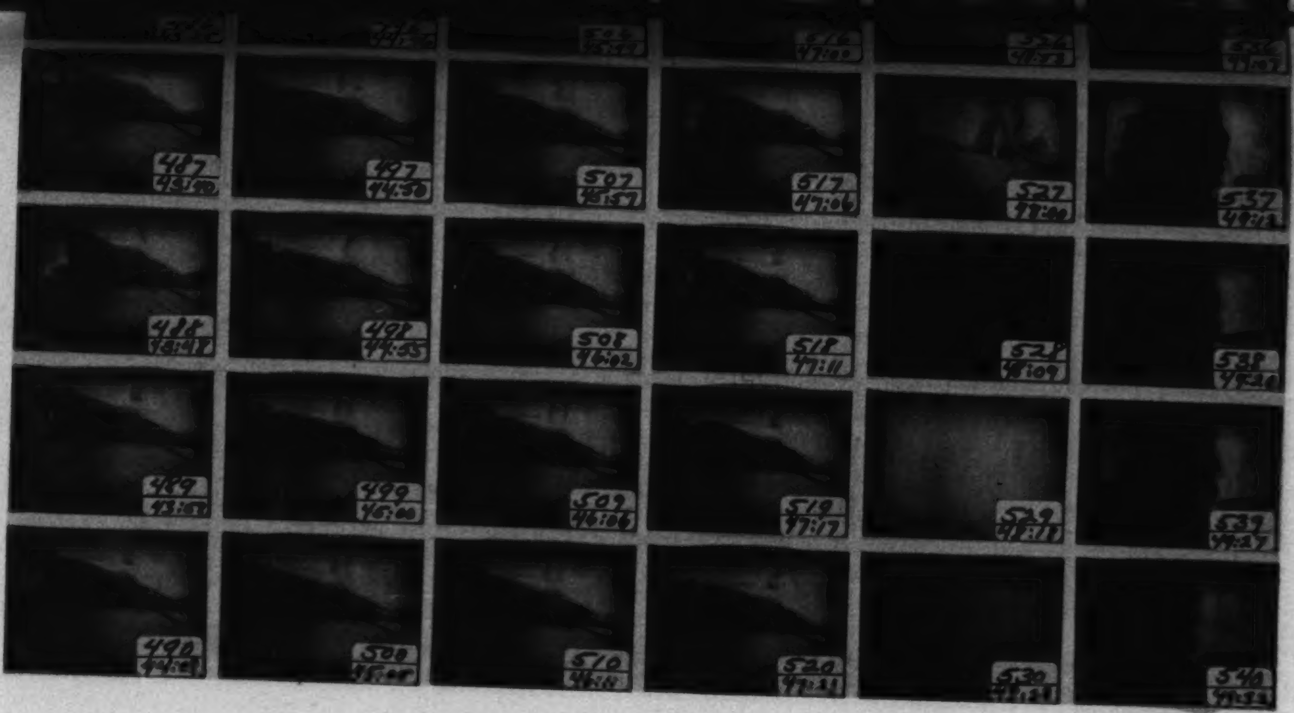
Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

427
39:15
437
447
457
467
477
428
39:20
438
448
40:16
458
468
41:24
478
429
39:23
439
449
459
469
479
430
440
450
460
470
480

"BLUE MOVIE"
(Part 9 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).


481
491
501
511
521
531
482
492
502
512
522
532
483
493
503
513
523
533
484
494
504
514
524
534


506
516
47:00
526
536
487
497
44:50
507
45:57
517
47:06
527
537
488
43:47
498
44:55
508
46:02
518
47:11
528
48:09
538
489
499
45:00
509
519
47:17
529
539
49:27
490
500
510
520
530
540

"BLUE MOVIE"
(Part 10 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

541 49:41
551 51:11
561
571 52:55
581
591
542 49:56
552 51:17
562 52:05
572 53:02
582 54:03
592
543 50:09
553 51:21
563 52:12
573 53:08
583 54:10
593
544 50:20
554 51:26
564 52:17
574 53:14
584 54:16
594

547
50:48
557
51:36
567
52:34
577
53:36
587
54:41
597
55:56
548
51:00
558
51:41
568
52:39
578
53:44
588
54:47
598
56:03
549
51:04
559
51:46
569
52:44
579
53:46
589
54:53
599
56:12
550
51:07
560
51:52
570
52:51
580
53:50
590
55:00
600
56:19

"BLUE MOVIE"
(Part 11 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

601
611
621
631
641
651
602
612
622
632
642
652
603
613
623
633
643
653
604
614
624
634
644
654

626
636
646
607
57:32
617
58:39
627
60:03
637
61:40
647
63:25
657
64:57
608
57:41
618
58:45
628
60:11
638
61:49
648
63:35
658
65:02
609
57:45
619
58:50
629
60:19
639
61:55
649
63:40
659
610
57:47
620
58:57
630
60:37
640
62:02
650
63:48
660
65:25

"BLUE MOVIE"
(Part 12 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

661
671
681
68:19
691
701
70:51
711
662
65:40
672
67:00
682
68:25
692
70:06
702
71:00
712
663
673
67:05
683
68:35
693
70:09
703
71:10
713
72:02
664
65:53
674
67:14
684
68:42
694
70:12
704
71:18
714
72:01

666
676
67:39
686
69:05
696
70:20
706
71:26
716
667
66:19
677
687
697
70:25
707
71:41
717
72:21
668
678
67:58
688
69:32
698
70:30
708
71:45
718
669
66:36
679
689
69:41
699
70:57
709
71:46
719
72:34
670
66:42
680
690
69:54
700
710
720

"BLUE MOVIE"
(Part 13 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

721
731
741
751
761
771
722
732
742
752
762
723
733
743
753
763
773
724
734
744
754
764
774

727
72:152
737
73:18
747
74:14
757
767
76:109
777
728
72:157
738
73:22
748
74:04
758
768
76:08
778
729
78:100
739
78:26
749
74:08
759
75:11
769
76:05
779
730
740
750
760
770
780

"BLUE MOVIE"
(Part 14 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

787
77:29
797
78:46
807
80:22
817
81:51
827
82:26
837
83:
788
77:30
798
78:57
808
80:27
818
81:53
828
82:36
838
83:4
789
77:38
799
79:05
809
80:38
819
81:57
829
82:45
839
83:45
790
800
810
820
830
840

"BLUE MOVIE"
(Part 15 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

"BLUE MOVIE"
(Part 16 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

901
87:44
911
88:33
921
89:26
931
90:28
941
91:29
951
92:39
902
87:48
912
922
89:34
932
90:27
942
91:31
952
92:43
903
87:52
913
88:42
923
89:40
933
90:35
943
91:39
953
92:47
904
914
924
934
944
954

957
958
959
960
947
948
949
950
937
938
939
940
927
928
929
930
917
918
919
920
907
908
909
910

"BLUE MOVIE"
(Part 17 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

"BLUE MOVIE"
(Part 18 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).

1021 98:24
1026 98:43
1031 99:11
1022 98:29
1027 98:47
1032 99:16
1023 98:32
1028 98:53
1033 99:22
1024 98:35
1029 98:57

Smyth and based upon that affidavit he signed the arrest warrant. The arrest warrant was a formal bench warrant in which he struck out the word "clerk" and put his own name thereon (11a).

On cross-examination by defense counsel Joel H. Weinberg, Judge Goldberg stated that he had gone to the Garrick Theatre upon the oral request of Ass't. District Attorney Richard Beckler; that Beckler did not go to the theatre with the Judge and that Beckler had told him he had seen the movie on the day before (13a). He did not check the signs outside, but he did not recall any signs indicating an age at which a person had to be, to be admitted. He did not recall any titles on the film (13a), nor did he see any warning at the ticket booth as to the age that people had to be, when they entered the theatre, but that he wasn't looking for the same. He stated that Inspector Smyth paid the admission price and that he did not have any discussions with Inspector Smyth during the filming, except that at one point he did ask how much longer the film had to run. Asked whether the film was boring Judge Goldberg answered, "Well, I don't know whether that weighed very heavily with me. The answer is for the most part, yes." (15a)

The Court sustained objections to questions as to how many motion pictures the Judge had seen during the calendar year 1969, any special training he may have had in motion picture techniques, how conversant he was with the Redrup decision, the definition of obscenity as he understood it, the criteria by which he determined the film to be obscene, and the camera work in the picture which was offensive to him (15a-17a).

Charles Smyth, Deputy Inspector, assigned to the First Division, New York City Police Department testified on direct examination as to the circumstances surrounding his viewing of the film and his execution of the arrest warrants and seizure of the film. He stated that during the month of July 1969, he had occasion to see the motion picture film, "Blue Movie," twice (19a). He first saw the movie on July 29, 1969, at the Garrick Theatre, 152 Bleeker St., New York City, in the Greenwich Village section, in company with Inspector Rockwell and Lt. Sullivan of the Manhattan South (19a). He saw that show at approximately 3:40 to 5:20 P.M. He next saw the movie two days later, on July 31, at approximately the same showing time, in company with Judge Goldberg. (19a) He stated that on each occasion there were approximately 100 people in the theatre and the seating capacity of the theatre was about 200 (19a). He stated that he accompanied Judge Goldberg to the movie on July 31 at the request of the District Attorney and that, at the conclusion of the performance, Judge Goldberg and he walked outside after which he asked the Judge if he felt it was obscene. He stated that the Judge then signed an arrest warrant(20a) which was also a search warrant giving law enforcement the right to search for the film (21a). At the conclusion of the signing he took the three arrest warrants, went back into the theatre and placed the manager, the projectionist and the ticket taker under arrest and seized the film which was in the projection room (21a). The only property which was taken from the theatre was the three reels of film (21a), one of which was still in the projector in the projection room. The other two reels were lying next to it (22a). He stated that he arrested the defendant, Mr. Heller, whom he knew to be the manager of the theatre "pursuant to these arrest warrants." (21a, 22a).

On examination by the Court, he stated that prior to the issuance of the arrest warrants he had signed a complaint, which he swore to on the previous day, July 30, 1969, (23a), which was presented to Judge Goldberg with an application for search and arrest warrants (27a); that thereafter, Judge Goldberg signed the search and arrest warrants after which he arrested the three people and seized the film. He stated that a blue complaint was drawn up that evening after the arrest (26a). A copy of the latter complaint appears in the Appendix at page 1a and is reproduced hereinafter at Appendix J, page 12. He stated that Judge Goldberg signed the arrest warrants after Judge Goldberg had seen the picture and had been presented with the supporting complaint affidavit, which he, Smyth, prepared and had sworn to on the previous day (27a).

On further examination by the Asst. District Attorney, he stated that when he walked into the projection room one reel was in the projector and two reels were alongside (27a); that he talked to the projectionist whom he arrested (28a, 1a); that he took the three reels and had them sent to the property clerk's office; that he had them vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office where it remained until August 26, when he picked them up from the property clerk's office (28a); that since that time the film has been in his possession in his locker which has a private lock, the combination of which only he knows; that he had the three films with him today which were stipulated into evidence as Peoples 1 in evidence on agreement of the Prosecutor and defense counsel (29a).

On cross-examination by defense counsel Joel Weinberg, Smyth stated that on both occasions he paid an admission fee and that at neither time did he recall seeing any sign in the lobby with regard to age (29a-30a); that the application for the search and arrest warrants were signed in Judge Goldberg's presence on July 31, after viewing the film, and that the formal complaint in the matter was drawn subsequent to the arrest (30a); that he had seen the defense attorney at the Garrick Theatre at about 6:00 that evening, who originally stated that he was the manager; that upon being advised that he had a John Doe warrant, the defense attorney then stated he was only the lawyer and that Mr. Heller was the manager; that he did not recall seeing any sign above the ticket taker's booth indicating that one had to be over the age of 17 to get into the theatre. He stated that Mr. Heller arrived that night with the key to the manager's room which was examined with his permission (31a-32a).

An objection was sustained as to the question, "Are you aware of the dramatic change in social climate with regard to the depiction of sex on the screen?" (32a). He stated that he had no special training as a theatre critic nor did he have any journalistic background with regard to the theatre (34a). He stated that during the course of the movie, Judge Goldberg asked him if it was much longer (34a). Asked "Did you find the movie boring?", he answered, "Absolutely," and "I found the entire thing boring, repetitious, if you wish." (34a-35a). He stated that to the best of his recollection he did not recall seeing any Andy Warhol films before, but that he might have seen them and not known it. An objection was sustained as to the question, "Did this movie arouse you to go out and find a woman and go to bed with her?" (35a).

The three reels of film were exhibited to the Court (35a-37a). The Court made the following observations at the showing of the first reel: "For the record, what are these people saying, none of the judges can hear? "Is there anything wrong with the machine, or is that the way it is going to be projected? Is that the way it is going to go?" (Film runs) Because we find it extremely difficult to understand most of the words being said. . . ." (36a). . . "All right, go ahead, sorry. (Film runs) The sound is much clearer now. (Film runs) At this point the sound is dead. (Film runs) Although we can observe the actors are talking to each other (Film runs). All right, we will take a recess." Upon the conclusion of the viewing of the three reels, the People rested their case.

The defense made its first motion since the charges were filed, which was a motion to dismiss on the ground that the People had not introduced any evidence on the elements which made up the obscenity test, (38a) and on the ground that there had been no prior adversary determination (39a) citing Lee Art Theatre v. Virginia, 392 U.S. 636 (June 17, 1968). The Court noted that defense counsel was not attacking the sufficiency of the warrant or the affidavit in support thereof, to which defense counsel noted, "I don't believe I have to attack the warrant." (49a) The Judge replied: "Well, that is a moot question now . . . the Presiding Judge also noted, "Well, I just want to say one thing. It seems to me, and I am not going to talk for both my colleagues, that if you are talking about the warrant and the seizure, your remedy would be motion to controvert the warrant. . . ." to which Judge Tolleris agreed (51a). At the conclusion of argument, the defense motion to dismiss was denied. (52a).

2. The Defense.

Parker Tyler was offered by the defense as a witness to testify on "prurient appeal" and "social value." He stated that he resided at 15 Charles St., New York, N.Y., and that he wrote books for a living (53a); that he wrote books about motion pictures and painting and that since 1944 he had written six: Namely, (1) The Hollywood Hallucination, (2) Magic and Myth of the Movies, (3) A Biographic Study of the Chaplin Myth, (4) Classics of the Foreign Film, (5) Three Phases of Film, and (6) Sex Psyche, etc. In the Film; that for the past four years he had attended the New York Film Festival where, in the special events program, there were lectures and programs in which he participated (55a); that he lectured at Columbia University, at the New School Social Research, at Cooper Union, at Trinity College in Hartford, and at Albright College, Pennsylvania (56a); that he was paid for these lectures but not in every case; that during the course of a year he would see about 100 motion picture films; that he had written articles for a number of academic magazines, such as the Kenyon Review, which used to be published by Kenyon College; the American Quarterly, published by the University of Pennsylvania, and by the New Republic and the Nation (56a-57a); that all of these articles dealt with films (57a); that he was not being paid for his testimony and that he had seen the defense attorney today for the first time (57a).

He stated that he had seen Andy Warhol's "Blue Movie" at a private screening about a year ago and that he devoted a chapter in his latest book, "Sex Psyche, etc. in the Films" to Andy Warhol's "Blue Movie" (57a). Judge Moldow made the following comment: "Before we get into that counsel, I will tell you something that disturbs me. We viewed a film, during the course of today, that was very badly edited in many spots, and I don't think you have to be an expert to see that. This witness has been asked questions about a movie that he saw about a year ago. Aside from the fact that you have identified it by the title, what kind of assurance of any kind do we have that the contents approximated what we saw today? Do you intend to establish that in any manner?" The defense counsel made the following reply: "I can't. I think it is almost impossible for me to. . . ." The Presiding Judge made the following comment: "That is a problem in these cases that my colleague indicated a little earlier with the affidavit situation. The judge relies on an affidavit, he doesn't know whether that same movie is going to be seized according to the terms of his warrant. Now you are in a similar posture, offering evidence. All we know is he saw something called 'Blue Movie,' and to identify it foot by foot with what we saw today is, I appreciate, an overpowering task, isn't it?" The defense counsel replied: "I think it is, but I think, your Honor, if we take the position that we have never refuted the contents of the film that you saw here today, particularly the one-act, and this witness is not going to refute that, I don't think there is any unconventional sex in the film, and I don't think there is any problem in dealing with this witness' having seen the film that your Honor saw this morning. . . ." (57a, 58a).

Asked if he saw any social value in the film, he replied, "Yes, I saw a particular social value. I think it represents what might be called the attitude of the cool world toward sex." (59a); He stated that by that term he meant the attitude that has grown up in modern times, along sophisticated lines, among youth groups. It is an attitude of detachment, of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction." (60a)

Asked concerning the technique employed in the film, he replied, "It is always like unedited footage, strung together, rather informally, and independent in the subject matter, but not in camera technique to aesthetic values." Asked to explain what he meant by camera technique and aesthetic values, he said, "When a film is made to be interesting, all kinds of shots, closeup, and medium shots, and so on, for variety's sake, different angles of the same action, but Warhol's camera is nearly always staring deliberately passive, doesn't try to articulate anything on its own, the actors articulate everything." (60a)

He stated that the film was not sexually stimulating, was not lewd according to his notion, and was not lascivious or salacious. (61a)

On examination by the Court, he was asked whether he had seen films of that nature, to which he replied, "Yes, not any blue movies, not the films that are manufactured purely for pornographic viewers. . ." Asked what he meant by the expression "blue movies," he answered, "A film made . . . for stag purposes" (61a). He stated that the term "blue movie" had a special meaning in the motion picture industry and that Warhol's film was advertised that way in the newspapers at times and the Village Voice, but that was not the original title which was "FUCK" (62a). Asked his age, he stated, "65."

On cross-examination by District Attorney Beckler, he was asked to give his formal education. He stated that he left Chicago Latin College in his sophomore year to write; that Chicago Latin College is a college preparatory school and that his formal schooling ended at age 16. (63a) He stated that he had not taken any courses in film making or film editing or film photography or film criticism.

Asked whether "this cool world attitude toward sex" is portrayed through conversation or acts, he replied, "Through the acts, it all meshed as though it were quite an ordinary occasion, not a special occasion when the emotions are raised to a high pitch of sexual feeling." He stated that he regarded the conversation in the film as irrelevant and incidental, and the theme of the movie to be essentially what you see, not what you hear (65a). He stated that he had seen about 8 or 10 of Andy Warhol's movies and that there was no story line to "Blue Movie" (65a). He stated that when he saw the movie, he had difficulty hearing the sound which was a little low (66a). Asked for the point of distinction between the films on 42nd Street which he regarded as lewd, and "Blue Movie" which he regarded as not being lewd, he replied, as to the former, "Well, everybody leers, there are all kinds of exhibitions of anatomical parts, it is kind of a flirtation, all seems very naughty and lascivious. . ." Asked by the Presiding Judge, "The picture that merely titilates is lewd, but a picture that actually shows copulation is not lewd, is that your definition, sir?" The witness answered, "That's right." After agreeing that two-thirds of the film was devoted to the couple in bed, and one-third to the same two parties nude in the bath tub together, witness was asked by Judge Moldow, "Isn't that substantially similar to the method in which the sexploitation films that you refer to as lewd, proceed, where almost all the time that the spectator views the scene, he is seeing some of sex conduct?" The witness replied, "They are parallel but not alike at all because they are done in an entirely different spirit, and also they are absurd concoctions of plot which is exploitational, whereas the method here is to be very natural, very ordinary, matter of fact." (70a)

Asked by the Court who the publisher of his latest book was and how long it was, he replied, "Horizon Press, and 250 pages" and stated that 8 pages of that was devoted to "Blue Movie." A copy of the book was admitted into evidence as Defendant's Exhibit A without objection.

Asked by the Presiding Judge, "You say you found the picture had a social value, social redeeming value. For what reason, sir?" The witness replied, "Because it represents an attitude of modern youth toward sex, and I think that is very vital." He stated that he would label that as the theme of the picture, the underlying theme – the "cool" modern attitude of the modern generation toward the sex act. (72a)

Charles Winick was offered by the defense as a witness to testify on "prurient appeal" and "social value." He stated that he resided at 160 Riverside Drive, New York, N.Y., and was a professor of sociology at City University of New York (73a); that he spent a good part of the last 20 years studying the effects of mass media, especially on young people; that he spent two years preparing a report for the Joint Commission of Mental Health of Children, a Congressionally funded agency, on the effects of mass media on the behavior and health of young people; that from 1961 to 1967, he was Chief Consultant at NBC television network on the permissibility of material to be shown on the television network; that in 1957 he began a 2-year study supported by the Ford Foundation on censorship which resulted in a book published in 1959 called "A Taste and the Censor"; that in 1964 he received the

George Foster Peabody Award for distinguished achievement and meritorious public service in television, for a book which he wrote on the effects of television on young people called, "For the Young Viewer"; that from 1959 thru 1961 he was the Director of Basic Research for the J. Walter Thompson Advertising Agency, developing a program of research on the effects of mass communication; that he had published about 250 articles in professional journals, and ten books concerned with mass media; that his last book was called, "The New People" published in April, 1968, which was particularly concerned with the changing attitudes toward sex in the United States; that the longest chapter in that book deals with the presentation of sex in movies; that he has at various times been a consultant to the United States Subcommittee on Juvenile Delinquency in its investigation of pornography and has been consultant to the New York State Assembly and various other legislative groups (75a); that he taught those subjects for about 20 years at the University of Rochester, M.I.T., Columbia, and the City University and had directed about 400 studies on the effects of mass media on young people; that his articles have appeared in professional journals, such as "Social Problems" published quarterly, and in film publications, such as "Films and Filming"; that his doctorate is in sociology which he received at New York University in 1950 and that he is a fellow of the American Sociological Association and a licensed psychologist in New York State (76a); He stated that he had been asked by the United States Attorney to testify for the Government in the "I Am Curious (Yellow)" case but had, instead, testified for the importer (76a). The Court sustained an objection to the question, "Are you aware of the dramatic change in conventional and unconventional sex as depicted upon the screen?" (77a)

He stated that he had seen Andy Warhol's "Blue Movie" "last Thursday evening" at the request of the defense attorney. Asked if he saw any social value in that film, he stated, "Very much so." He stated that the film presents a growing and important point of view about sexual behavior by a director who represents increasingly the views of a great many people, a film which enables people to explore their own attitudes in a constructive way, and represents an important statement about private life, and personal behavior, by a film director who many people are coming to regard as someone who speaks for them. He stated that he thought more and more people are looking to films for this sort of re-enforcing of their views and attitudes which they previously got from novels, and other printed material. He thought that it had a great amount of clinical interest in the presentation of two different character types, a non-responsive woman, who is quite a celebrity in her own way, and an aggressive fellow; that there is a great deal of clinical interest in the very realistic presentation of their sexual behavior, without any attempt to make it stylized or to build in artificial values, or to make it hokey and to titilate the viewers." Asked if he found the film sexually stimulating, he stated, "Exactly the opposite." He stated that the film was not aphrodisiac and that it would dull a sexual interest because it makes the sexual behavior of the couple routinized and not following the typical kind of crescendo approach of many movies with overpowering music building up to a climax, with a shot of waves breaking on the shore and that sort of thing . . . .; that the tawdriness of the surroundings, the lack of carefully selected costumes, the flatness of the image on the screen, the nonuse of the usual long shot, medium closeup of the movies, the lack of the makeup so that you can see even pimples on the back of the girl, and so forth, make sex a less mysterious and provocative act, and a kind of mundane, casual activity. He stated that the fact that it takes so long, also serves to, make it anti-sexual to most people . . . . (79a).

Asked by the presiding judge whether he did not find the sex act was performed most explicitly in the picture, he stated that he thought there was a certain amount of ambiguity about what was happening because there was no closeup. To this, the presiding judge replied, "That is, you didn't actually see the male organ penetrate the vagina." Whereupon the witness stated, "Yes, that's right. I think, if I may be permitted, there was a certain amount of ambiguity about what had occurred. . . ." The judge then asked what impression he got as to what occurred, to which witness stated, "Well, I would say that it is likely that in fact they had engaged in sexual intercourse, but I would say that I couldn't be sure of it." He stated that he would say that the intention of the film was to convey the impression that sexual intercourse had been engaged in (80a). Asked by defense counsel Weinberg whether he found the film lewd, salacious, or containing any forms of unconventional activity, he stated, "No." (80a)

On cross-examination by Ass't. District Attorney Beckler, he stated that he had seen Andy Warhol's film, "The Chelsea Girl" most recently; that he had seen sexational movies on 42nd Street, maybe two or three a year, in the line of duty (82a). Asked to differentiate between the two, he stated that the sexsational movies tried to present sexual behavior in a titiliating manner, surrounding the activities with as many provocative situations, such as sounds and music, and the removal of clothing, and so forth; that they were not trying to make a statement about the situation of contemporary men and women in this country today; that they don't have political discussions on the role of the police in modern society and discussions on Frank Klein as a modern artist; that the director of the "Blue Movie" was trying to bring to these modern arts, Vietnam, the role of the police, and so forth, to indicate the relationship between sexual behavior and the larger political attitudes; that the 42nd Street movies in no way try to bring in such larger social considerations, or bring in political attitudes, and that they surround sexual behavior with a lot of hocus pocus and costuming and so forth and that "Blue Movie" was totally different from the exploitation movies (82a). Asked by Judge Muldow whether the title, "Blue Movie" had a connotation to him in the film industry, he replied that he interpreted the title as the artist's semi-jocular of what he is doing; that he used the title "Blue Movie" as a kind of satiric way to indicate that society and many people might think what he is expressing in "Blue Movie" (but the viewers wouldn't think) was blue (83a).

Asked by the District Attorney whether it would be fair to say that it is his opinion that the theme of this movie is the portrayal of the sex act without the great highs and lows that could be a natural, real, not at times a very elevating or very depressing state, he indicated, "I think that would be a fair statement" (85a). He stated that it would not be a fair statement to say that it really doesn't make any difference what they were talking about while they were doing the act (85a). He stated that it was his opinion that this performance was realism (87a); he stated that there was ambiguity in the film not as to what they were doing, but as to the relationship between the film maker and the fact that there was a film being photographed, as in the "I Am Curious (Yellow)" case.

Asked whether realism as opposed to the trumpet sounding and music would in most cases never titiliate the public to the degree that a movie with such things as that would, he replied that he would say so for the same reason that we know that the nude figure is far less likely to titiliate most people than the partially clothed figure (89a).

He stated that he could see showing this movie to a class at medical school or a group of residents in psychiatry, presenting these two characters as types, the female, the distant aloof and non-responsive woman, and the energy-getting, sexually aggressive male trying to achieve his goal while the woman is not really cooperating with him in this (91a). On questioning by Judge Moldow, he stated that he would not present it to a college group unless it were a highly specialized class in psycho-pathology or something like that. Asked by Judge Moldow, "You wouldn't present it to the general population between the ages of 18 and 22," the witness answered, "Well that would depend. I think that I would in general, I would have confidence that the nature of the film is such that there would not be. . . ." (91a). He stated thereafter he would not present it to an undifferentiated group. He thereafter changed his answer to, "I would say so." Asked by Judge Moldow if he had reservations he stated, "I hesitated for a moment, but, on balance I would say so." Asked by the presiding judge, "For what purpose would you present it to such an undifferentiated group? . . . For clinical observation or study or general entertainment?" the witness answered, "Well, I don't know that I would accept those two categories." Pressed by the Presiding Judge further, he stated, "Well, I have already said for clinical observation. It certainly has a value, and I would state that as an example of an important kind of theatrical film and I would say an entertain ment film."

Asked by the Presiding Judge concerning his statemen that the woman was not cooperative in the picture, he admitte that she did engage in what appeared to be sexual intercours she did gyrate her buttocks as if engaged in the act, she di kiss and embrace him, she did fondle the parts of his bod she did soak his penis in the shower, and raised it from placid state to at least a semi-erect state, but he qualifie those admissions with the statement, "All of those things ar true but there was a kind of distance and lack of involvemen in its." (93a)

Asked whether or not he had any trouble understandin what was being said in the movie, he first stated, "I don think so." He later admitted, "I am sure there was a few bit that I didn't, I couldn't understand," but attributed that to th particular print that he was viewing (95a). He stated "Blu Movie" was not a film with a beginning, middle, and end plo that it begins abruptly and ends abruptly. He stated that h didn't believe that Mr. Warhol made films with messages Asked if he came away with a theme, he stated, "A theme yes, but a theme is not a message, and to paraphrase wha the theme of the film means in a couple of sentences is lik saying Gone With the Wind is a story about a woman whos plantation burns down and finally gets the plantation back. (97a)

Asked by the Presiding Judge what he meant by lewd, h stated "The presentation of substantive material which pre sents sexual content in an offensive or pathological or titili ating manner." He further stated that the film was not lew because it was a realistic presentation of an act of coitus which did not seek to present that act in an offensive or pathological or titiliating manner (99a). Asked by the Presiding Judge, "What is the distinction characteristic of this film that leads you to conclude that the realistic presentation of an act of intercourse does not titiliate?" . . . the witness replied, "As presented in this film, it does not titiliate." Asked how old he was and why it didn't titiliate, he stated he was 47 years old and that from his interviews of over 20,000 people in the past 12 years he thought he had an impression of how different age groups responded (100a).

Before recessing for the day, defense counsel Weinberg asked the Court whether it would be necessary to testify in the record that the film seen by Dr. Winick was the identical subject matter as viewed by the Court, the District Attorney refused to join in a stipulation on that matter, saying, "I think it goes to the weight whether or not it is the same. . ." (103a)

On Sept. 17, 1967, the trial resumed with Thomas Phillips testifying as a witness for the defendant on "social value" and "prurient appeal." Phillips stated that he worked for the New York Times writing radio newscasts for Station WQXR; that he had done so for slightly over four years; that in addition he was a freelance writer and wrote articles for newspaper publications such as the Times, the Time Magazine, the Village Voice, Rolling Stone, Pop and New York Scenes Magazine about the arts, film, theatre, popular music and books; that he recently wrote an article on "Blue Movie" for the Village Voice; that he was 27 years old, married, and the father of two children; that he had first talked to the defense attorney this last weekend and had seen Andy Warhol's "Blue Movie" prior to having talked to the defense attorney (105a).

He stated that he saw "Blue Movie" at the Garrick T approximately two months ago and as a result of seein movie wrote the article; He stated that in his opinio film had social value; that the basic theme of the movi about the political and social situation in this country (106a).

Asked by the Presiding Judge what he meant by th stated, "I think I know that the characters in the movie a great deal of time talking about subjects such as taxe war, presidential election, police. I think that their conc was very clear, that they felt along with many other peo this country, that they had been somehow cheated, tha votes and their taxes, had not only been wasted, but had ally been turned against them, and in connection with feel that the movie offered not only an outline of their cal and social dilemma, but also a solution of sorts." (Asked by Judge Tolleris, "What solution would you s the witness stated that "in the face of political powe ness, in the face of evil over which there is seemin control, the thing to do is to stay home, refuse to conten the situation, and find what happiness you can in privat sonal relationships." (107a) He stated that he did no the film to be lewd or salacious.

On cross-examination by the District Attorney, he that he had seen five, six or seven of Andy Warhol's m and that he had seen a couple of the sex-type movies on Street quite a while ago. He stated that he could not a hear the conversation but attributed that to what is "natural sound" (108a); He stated that the sound in the ual intercourse scene in the beginning was far off and th couldn't pick up all of it. Asked by the District Attorn be a little more specific as to how he arrived at the conclusion that a solution was offered by the movie, he answered, "Well, the whole movie is about that." The following colloquy took place between the witness and the Presiding Judge:

Presiding Judge: "Just a minute, you said the whole movie is about that, and I said, about what?"

Witness: Okay, okay. What is the movie? The movie is day spent, more or less a day spent, between two people."

Presiding Judge: "Engaging in sexual intercourse?"

Witness: "Engaging in sexual intercourse, and a great deal more than that, engaging in a great deal of conversation."

Presiding Judge: "A great deal of conversation?"

Witness: "I would say a great deal of conversation."

Presiding Judge: "Well, now how much time did the whole film take?"

Witness: "I believe it took an hour and 45 minutes, is that correct?"

Presiding Judge: "And how much of that time was spent in conversation?"

Witness: "I did not time it, but I would say the bulk of it."

Presiding Judge: "The bulk of it?"

Witness: "More than half of it."

Presiding Judge: "The bulk took place about what?"

Witness: "About Viet Nam, taxes, and . . . ."

He thereafter stated that about one-half hour was devoted to conversation about the political and social situation which occurred in the relaxed reel, following the intercourse scene; that is, the reel between the bed and the bathtub, was the political conversation. Judge Moldow thereafter stated, "In other words, it was confined to the second reel which was possibly one-third of the movie. During that second re isn't it true that the parties were nude the entire period time?" to which the witness replied, "That is true, bu didn't think that was particularly important." (114a) He stat that "there was an organic connection between the sexual i tercourse scene and the political scene. To express it ve succinctly, . . . the sexual intercourse was an emblem of t alternative to struggling against corruption, and disorder society." (115a)

He stated that the movie was not lewd to him because did not present sexuality in a narrow impersonal way. Aske what he would consider lewd, the witness stated he wou "consider a movie lewd in which there was attempt made to characterizations or any attempt beyond pure simple straig depiction or straight sex where there was no kind of huma involved at all, no kind of human relationship between t audience and the people on the screen." (117a) Asked Judge Moldow if there were such an involvement and such relationship did exist, would it matter in what manner the s was portrayed, the explicitness, whether you used telepho lens when you showed genital parts, etc. . . . The witne stated, "I couldn't actually say because we are just dealin with this movie." (118a) Asked to restate the dominant them he said he thought "the dominant theme had to do with t political and social situation in this country today, and possible solution to the political dilemma of people findi themselves in a feeling of powerlessness to deal with instit tions they feel are evil." (118a) Asked by Judge Toller whether the sexual part of the film was necessary, he replie "I think it is an organic connection to the political and soci contents of the film, and in a sense . . . an emblem of t alternative to struggling with evil and corruption (119a)."; to which the Presiding Judge commented, "You mean if you can't fight evil and corruption, let's indulge in sex, is that it?" Asked by the Presiding Judge, in his view as a critic, whether the symbolism could not be portrayed without all the anatomical details of the sexual act indicated in the two scenes, he stated that he supposed it could, but that in his view, it was done in the best most tasteful way (120a). Asked by the Presiding Judge whether the photographic depiction of the intercourse and the manipulation of the male's private organ was a tasteful way of showing the actor's dissent with taxes, war and politics, the witness stated that "it was a tasteful way and I base this on other reasons," that is, that it was more tasteful that the sex scenes one generally sees in movies which do not include genital organs . . . that it was so realistic that it was relatively normal compared to the hysterical and exaggeration that appear in the cleverly censored sex films (123a). Asked by the District Attorney whether he would show it to any cross-section of the public, he stated that he would and that it was a better sex movie to show to young people, say between the age of 18 and 22, than any others he had seen because it was the most realistic and the most benign as far as its outlook on sex was concerned (125a).

When the Presiding Judge pressed the further question on the discussion about taxes, war and politics and the time that such discussion took, the defense counsel objected on the grounds that during the course of the examination of the witnesses for the defense there had been more than 75% of the examination on cross-examination conducted by the Bench (129a), to which Judge Moldow replied, "We have to take note of the facts, that this is not the ordinary type of criminal case where we have to listen to witnesses who are there, and the court was not there. The judges all saw this film and t what we are talking about. . . ." (130a) Asked by the Pr ing Judge whether he would characterize the statements by either of the actors in the film with respect to war, po and taxes, as a discussion of the subject implying a change of ideas and views between two people or m statements, such as I won't vote or I won't go, the wit answered, "I think it was a conversation in the sense th generally have conversations." (130a)

The petitioner, Sol Heller, testified on his own behal stated on direct examination that he resided at 252 E. Street, New York, N.Y.; that he was the theatre manager a Andy Warhol Garrick Theatre and had been for almost years since it opened; that in the past eight years he had with Consolidated Theatres of Connecticut and the Fox ern Theatres and was the manager of the Cue Theatre T Club. He stated that he had never been connected with crime or even arrested. (132a, 133a)

Asked whether there were any signs in the lobb the theatre, he stated that the lobby in the Garrick Th was small and that immediately to the right, not more five feet into the theatre was the box office; that it w normal box office with a window, with a cut in the glass. that there were three signs about 7 by 9 inches in size; one of the signs was a schedule, one was the price, an third had a big X, with white letterings on a black backgr saying "No one under 17 admitted"; (133a) he stated tha house was a 299-seat house and that he hired all of the ployees; that some of his cashiers were permanent and o were temporary; that such persons were instructed that if one was obviously under 18 years of age, that identifica must be demanded and would have to be a driver's licen draft card, or something that would actually tell the age. He said he would not allow anyone under 18 in the theatre, even if it was a child of an adult (135a). He stated that he was at the theatre from 10:30 in the morning to about 2:30 in the afternoon, and from 6:00 or 7:00 in the evening until midnight, seven days a week (135a). He stated that to his understanding the film had played at the Repertory Theatre in San Francisco without incident (135a) and that it played there for seven days; He stated that if the picture had been declared by any judicial tribunal in the State of New York to have been obscene, he would not have played it at the Garrick Theatre. (136a).

On cross-examination, the petitioner stated that he had seen the movie before, and that he or an usher was present at every performance to collect tickets. Asked how many different cashiers he has had in the past six months, he stated ten (137a). He stated that while 17 is the legal age in New York, he arbitrarily set the admission age at 18 (138a).

Thereafter, the defendant rested his case and the People rested their case (138a).

At the end of the entire case, defendant moved to dismiss, emphasizing alleged constitutional deficiency in the search and seizure procedure, which did not provide any prior adversary hearing. The motion was denied and the defendant was found guilty by the unanimous court. The petitioner was thereafter sentenced to pay a fine of $250.00 or to serve 3 days in jail. He paid the fine.

On appeal to the Appellate Term, petitioner contended that the film is not obscene and argued that the film should not have been seized pursuant to a search warrant because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant. The Appellate Term, which had viewed the film, affirmed the conviction without opinion. One Justice dissented on the ground that the film was not obscene (179a-180a).

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an ex parte judicial determination is necessary before a search warrant for an obscene film may be issued and the movie seized. He also asserted that "Blue Movie" was not obscene. The Court of Appeals viewed the film and the 5-judge majority found it to be obscene. The majority also rejected the argument that this Court's previous decisions mandate an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the Second Circuit in Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. den. 397 U.S. 920 (1970), and Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." People v. Heller, 29 N.Y.2d 319 (1971) (181a-185a). A 2-judge dissenting opinion, written by Chief Judge Fuld, said that the film is not obscene; therefore, the search and seizure issue need not be reached (185a-186a).

SUMMARY OF ARGUMENT

I.

The manner in which the Petitioner has phrased the jurisdictional question: namely, "A prior adversary hearing involving First Amendment rights such as a moving picture film is not a question of discretion, but is a matter of fundamental constitutional rights. The Petitioner herein was entitled, as a matter of constitutional law, to a prior adversary hearing before the seizure of 'Blue Movie' was effectuated" obscures the basic legal issue which is before this Court. Amicus submits that to resolve this multi-phased jurisdictional question requires that the responsive proposition be more narrowly drawn and refined. If Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and show wherein the State of New York has failed to do something which the law requires. By way of reply, Amicus' analysis is pointed in the opposite direction, i.e., toward establishing that the State of New York, in proceeding as it did, has breached no duties under the Federal Constitution. Accordingly, Amicus' brief is drafted along lines which affirmatively establish that due process was accorded Petitioner at each of the three stages of the criminal proceedings herein: (1) At the arrest; (2) when the film print was seized, and (3) when the film print was admitted into evidence.

Petitioner was arrested pursuant to an arrest warrant for showing an obscene movie to the general public. The arrest warrant had been issued by a Criminal Court judge who himself had seen the film before issuing the arrest warrant. The arrest warrant was also a search warrant containing authorization to seize the film "Blue Movie." Respondent has opted for an affirmance based solely upon the precautionary search warrant procedure employed by the State, which paralleled the arresting process. The search procedure required a judge to secretly view the film himself prior to the issuance of the search warrant. Amicus is of the view that such procedures demean the authority of the judiciary and submits that a different approach should be employed which analyzes the seizure of "Blue Movie" as an incident to the execution of the arrest warrant. It has been held in New York, in several cases, that a police officer has the right to make a warrantless arrest for the crime of exhibiting an obscene motion picture film to the general public. Amicus submits that if that holding is good law, then, a fortiori, an arrest pursuant to an arrest warrant is also proper.

For the State of New York to prevail in warrantless arrests, three broad principles must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest.

The public policy of New York is strongly aligned against the public exhibition of obscene motion picture films. New York Penal Law Section 235.05 provides for criminal sanctions and Penal Law Section 410.00 specifically provides that films which are used to project pornographic motion picture films are contraband. That section defines pornography as a motion picture showing acts of sexual intercourse, which is exactly what "Blue Movie" is.

By virtue of a specific statute and the ruling case law in New York, Deputy Inspector Smyth had the authority to arrest a person without a warrant for a misdemeanor committed in his presence. The decisions of this Court indicate that rules such as these governing arrests are authorized by the Constitution to meet the practical demands of effective criminal investigation and law enforcement.

Whether a particular arrest without a warrant is constitutional or not depends *solely* upon whether, at the moment the arrest was made, the officer had "probable cause" to make it. Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. When the constitutionality of an arrest is challenged, it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

Petitioner claims that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a criminal court of law. That claim is highly unorthodox. A lone dissenting judge in Ohio v. Albini, stated the claim as "an unlawful delegation to the police of the plenary duty of the courts to determine whether there is probable cause to believe films obscene after argument by both parties." Those arguments were foreclosed by this Court's decision in Gable v. Jenkins, 397 U.S. 592. It seems obvious from Gable v. Jenkins that the State could have arrested Petitioner on the obscenity charge and, without seizure, proven their case by testimonial evidence of what the officer saw and heard.

The Kentucky Court of Appeals in Roaden v. Kentucky, October Term No. 71-1134, also being argued with this case, acted well within the scope of its authority when it decided that an obscenity arrest did not call for an exception to the general rule under Kentucky law as to warrantless arrests, where Kentucky procedures permitted the petitioner to contest the issue of probable cause as an ancillary matter i the criminal trial, either by way of motion to suppress or restore, or in an independent civil action to restore the property. The Kentucky Court of Appeals' solution is the majorit view at the present time. Several of the lower courts in Ne York have followed this rule in movie cases and the Ne York Court of Appeals has done likewise in the case of a arrest for printed matter.

In deciding this question, this Court must also keep i focus the due process considerations which support the Ne York State Obscenity Statute. Those include the universa verity that obscenity is a public nuisance which is abatabl under the law, the the ethical values shared by this Natio as a whole as defined in the state, federal and city moralit laws. These values exist for the benefit of the family uni which is at the very core of government in our Judaeo-Christian culture.

It was Deputy Inspector Smyth's sworn duty to enforc the state policy against obscenity and uphold the law Whether Deputy Inspector Smyth's arrest of the Petitione was constitutional or not, depended upon whether or not h had probable cause to make the arrest. The factual issue of probable cause depends upon two factors: (1) The natur of the film itself – the autoptical evidence, and (2) th capacity of a peace officer to evaluate obscenity in the ligh of the *Roth* standards. Petitioner's claim that a peace officer, an Assistant District Attorney, and a Judge all lac such capacity was recently made to and rejected by the Ohi Supreme Court as they have been by the majority of courts which have considered that problem. Independent of th personal capacity of Deputy Inspector Smyth to make value judgments regarding the *Roth* standards, the record shows that Smyth viewed the film in its entirety both on the day before and the day after its viewing by the District Attorney, who was responsible for Judge Goldberg's viewing of the film thereafter. "Probable cause" was established to Judge Goldberg's satisfaction. Petitioner having failed to attack the arrest warrant is precluded from denying that "probable cause" existed.

Society has a legitimate interest in suppressing crime and detecting criminals which requires: (1) That evidence be preserved intact; (2) that autoptical evidence be preferred over testimonial evidence, and (3) that the right of officers to seize the instrumentality of the crime itself be upheld as a deterrent to crime.

When there is an arrest for the exhibition of an obscene film, an emergent condition exists – the positive film print which was used for projection must be preserved intact so as to prevent alteration or cutting. The state cannot purchase a copy, nor if they were able to, could it be assured that the same would be the identical version. Some courts have called the print "indispensable evidence," in others, such as California, the courts have called it the "best evidence." In any event, it is the instrumentality of the crime, and it has been recognized many times that, without it, the prosecution must fail or be subject to reversal upon appeal. To prohibit the seizure of such evidence under these circumstances, would completely frustrate criminal prosecution.

It is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be, and the New York Court of Appeals so held in the Matherson case, where the seizure of obscene material incident to an arrest was not massive and was limited to the instrumentality of the crime. Even were this not so, the seizure herein was within the reach authorized by Chimel v. California, 395 U.S. 752.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. Under Ker v. California, 374 U.S. 231, a state court is entitled to rely upon this Court's express invitation for state courts to develop workable rules governing arrests and seizures, and is authorized to choose a state rule under which administrative "probable cause" would be examined judicially *after* an arrest by a peace officer.

By waiving a pre trial Motion to Restore the Film and the preliminary hearing, both of which procedures were open to him under New York law, Petitioner is now foreclosed from arguing prior restraint and First Amendment principles.

Petitioner was not deprived of due process when the positive film print was admitted into evidence at the trial. The District Attorney during his case in chief showed a complete evidence chain of the film's custody from the time it was first taken into the possession of Deputy Inspector Smyth at the time of the arrest until it was received in evidence as People's Exhibit 1. Further, the film was stipulated into evidence on agreement of the Prosecutor and Defense Counsel. (Page 63 herein.)

The search for objective truth requires that the law search out and preserve an autoptical evidence that which constitutes the instrumentality of the crime. Such trustworthy evidence will not only serve to convict the guilty, but it may also, in a proper case, serve to free the innocent.

The past decisions of this Court do not support Petitioner's claim that the denial of an adversary hearing prior to arrest and seizure amounts to a violation of due process of law. Petitioner's claim is of recent origin, having evolved out of the 1966 October Term reversals and the language of certain members of this Court, taken out of context in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961), A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Lee Art Theatre v. Virginia, 392 U.S. 636 (1968). The A Quantity of Books case concerned not a criminal prosecution but an auxiliary means of attacking obscene materials – criminal suppression of all copies through injunction, a form of relief given limited approval in Kingsley Book Inc., v. Brown, 354 U.S. 436 (1957). Such injunctive statutes are not always surrounded by the due process safeguards which automatically attend crimilar prosecutions. The seizure of all copies, as in A Quantity of Books, pursuant to an injunction, may impinge directly on the First Amendment, whereas a seizure of a single copy as evidence, antecedent to a criminal prosecution, is cognizable under the Fourth Amendment.

A chronological history of the cases demonstrates that misunderstandings have been placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution. Such misunderstandings have brought about a rash of bad law and chaos in this area of the law, including confrontations between state and federal courts of the order which resulted in the enactment of U. S. Code, Sections 2281 and 2284. One comes away from a study of these cases with the conclusion that the results obtained depend not upon established principles of law but rather upon the personal philosophy of the members of the Court writing the opinion.

Amicus submits that a state is not required to create an exemption to the traditional right of a police officer to seize evidence incident to an arrest. A distinction must be drawn between administrative probable cause determinations and judicial probable cause determinations. If the state judiciary prefers to test the officer's judgment after arrest by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement.

If, for no other reason than practicality and necessity, the right of those who administer the law to make an administrative determination of probable cause must prevail. With the judicial work load being what it is, this Court cannot afford to make it a constitutional requirement that the trial court undertake adversary proceedings inquiring into every film, magazine, etc., that is manufactured, exhibited, sold, or offered for sale or exhibition, to see whether or not there is probable cause to determine the same to be the proper subject for an obscenity charge.

II

The motion picture film "Blue Movie" is obscene in the "international" sense – "hard-core pornography." As such it is condemned under our federal constitution. In its opinion in *Roth-Alberts*, this Court noted that it was the universal judgment of civilized nations that obscenity should be proscribed.

It is a "Judaeo-Christian" culture which this Court is called upon to interpret. According to that "Judaeo-Christian" base, each citizen has and enjoys a personal civil right to live in an area which is free of the debasing influence of public indecency.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area. That industry's understanding of the public responsibility which it bears under this Nation's obscenity laws has been almost destroyed. Such confusion is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to, and brief reflection on the moral laws of this Nation dealing with sexuality shows that such public mores do *presently* exist and codify the *"National standards"* which this Court has been seeking to enunciate. Amicus has attached at Appendix B a state-by-state survey of those laws which deal with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity.

Under New York Penal Law section 410.00, et seq. a motion picture film showing acts of sexual intercourse (with stated exceptions not here applicable) is declared to be contraband as pornography and subject to seizure. This Court cannot disregard the plain meaning of the English language of those sections.

This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication and has repeatedly said that "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications." This Court has also said that the values of the culture can often be detected from the practices of the states. In reviewing the New York Court of Appeals' ruling that "Blue Movie" is hard-core pornography and in violation of that state's obscenity laws, the background of this Na-

tion's well-established ethical values must be consider
and weighed in the balance.

One just does not fornicate in public, be it actual
simulated – nor may he on the motion picture screen. Thos
"values" exist for the benefit of the family unit which is
the very core of government in our Judaeo-Christian cultur

The common standards of right and wrong, as embodied
the law, require that the film "Blue Movie" be held to
obscene as a matter of law. The Courts have always be
willing to take judicial notice of facts of a common or ge
eral knowledge which are incontrovertible.

The performance of sexual intercourse in public, wheth
real or simulated, live or as part of a motion picture film
against public policy and obscene per se.

Where obscenity per se exists, the Court can take jud
cial notice of that fact, and no further evidence on suc
issue is necessary. The test, as repeatedly voiced in th
courtroom, for obscenity per se is; "whether reasonabl
men could not differ, and could come to but one conclusio
i.e. that the material or performance is sexually morbi
grossly perverse and bizarre."

The suppression of "Blue Movie" through criminal pros
cution is not "thought control." The interest being prote
ted is the peoples right to control *public morality* – a ten
amendment right guaranteed by the Bill of Rights. The pe
tioner may not claim "thought control" through "prior
straint" where the interval between seizure of one copy
the film, as evidence, and the final decision of the tr
court has been only 48 days.

Obscenity and lewdness have long been the subject
criminal sanctions under the common law for the reason th
the great majority of people believe that the morals of "ba

people do, at least in the long run, threaten the security of the "good" people.

On this latter point, this Court has recognized in *Mugler v. Kansas* that the power to determine what is offensive to public morality is lodged in the legislative branch of government, and not in this Court. This Court's rulings in *Redrup v. New York* and later cases citing *Redrup*, are a clear violation of the principle voiced in *Mugler v. Kansas*.

The indirect effects of obscenity were recognized by Justice Harlan in *Roth-Alberts* where he stated: "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." The long range, indirect effects inference, acknowledged by Justice Harlan, was also recognized by a majority of this Court in *Ginsberg v. New York*.

ARGUMENT

INTRODUCTION

When this Court, a little over 15 years ago, heard arguments on the obscenity issue in *Roth v. U.S.*, 354 U.S. 476, hard-core pornography was a rarely seen under-the-counter item. At that time the Federal Government worked hard at keeping it under control. In the Government's brief in *Roth v. U.S.*, (at page 34) the Solicitor-General identified "hard core pornography" as one of three categories of materials which were caught in the net of the Federal Obscenity Statute, and estimated the same to encompass 90% of the total materials actually caught under the Federal Statute. To make sure that the individual members of this Court understood what was meant by that "underworld" term and that rarely seen item, the Solicitor-General, by letter to th Clerk of this Court, dated Apr. 19, 1957, sent numerou samples of actual hard-core pornography to the Cour

Somehow, the moral climate in these United States ha changed during the past 15 years – a deterioration of maj proportions has taken place which, in turn, has itsel back into the system, and accelerated the rate of declin

An attempt has been made herein to rivet this Cour attention on reality by following Solicitor-General Ranki illustrative argumentation noted above. Attached to th brief, at Appendices C thru I are photographic represen tions, by way of time-motion studies, of a cross-section the motion picture fare currently playing in New York a across the Nation. Amicus would emphasize that such fil are no longer the under-the-counter items which this Co considered 15 years ago, and the justices of this Court, considering the nature of their individual responses here would do well to re-examine the moral arguments made the Solicitor-General in his brief in *Roth v. U.S.*, supra(S Briefs of Counsel, appearing at 1 L.Ed.2 2199-2203) a take a long view at what is happening. In the year 197 those films are playing, without police opposition, whi has been "throttled" by the rulings of this Court.

Attached to this brief, at Appendix A, is a time-moti study of the motion picture film "Un Chant D'Amour" he to be obscene by this Court on June 12, 1967. In compari that time-motion study with others appearing herein, Amic is reminded of Judge L. Thaxton Hanson's inquiry of "Wh is going on here?", raised in his opinion in *Cinema Clas ics, Ltd. v. Superior Court of Calif.*, a copy of which appea at Appendix "A" in the Brief Amicus Curiae of Charles Keating, Jr. in *Roaden v. Kentucky*, No. 71-1134.

I

DUE PROCESS OF LAW WAS ACCORDED THE PETITIONER AT EACH OF THE THREE STAGES OF THE CRIMINAL PROCEEDINGS BEING CONTESTED HEREIN, i.e.: (1) AT THE TIME OF PETITIONER'S ARREST ON A CHARGE OF SHOWING AN OBSCENE MOVIE TO THE GENERAL PUBLIC; (2) WHEN THE POSITIVE PRINT USED BY PETITIONER TO PROJECT THE VISUAL IMAGES AND SOUND TRACK WAS SEIZED INCIDENT TO THE ARREST AS EVIDENCE BEARING ON THE CHARGE, AND (3) WHEN THE POSITIVE FILM PRINT WAS ADMITTED INTO EVIDENCE AT THE TRIAL, FOLLOWING THE STATES LAYING OF THE PROPER FOUNDATION IN THE CHAIN OF EVIDENCE.

A. Petitioner Was Not Deprived Of Due Process When He Was Arrested by Deputy Inspector Smyth on a Charge of Showing an Obscene Movie to The General Public.

The warrant which Judge Goldberg issued was, in reality, an *arrest warrant*. (See Statement of Fact at page 62). The "seizure" authorization contained therein was nothing that a New York police officer executing *any* arrest warrant did not already have *by operation* of law. Petitioner may not, ipse dixit, convert a simple arrest problem, involving an arrest for a Class A misdemeanor committed in public, into a search and seizure masquerade. A decision favorable to the People in *Roaden v. Kentucky*, No. 71-1135, being argued with this case, also decides this appeal.

Deputy Inspector Smyth arrested the Petitioner under the authority of an *arrest warrant* for showing an obscene movie to the general public. It has been held, and rightfully so, that a police officer in the State of New York can make a *warrantless arrest* for exhibiting an obscene movie to the general public, *New York v. Lake Ronkonkoma Theater Corp.* 59 Misc.

2d 438 (Mar. 6, 1969). Compare *New York v. Matherson*, 16 N.Y.2d 509. In the *Lake Ronkonkoma Theater* case, the Court noted at page 442:

> "The New York State arrest statute, subdivision 1 section 177 of the Code of Criminal Procedure, provides:
>
> "A peace officer may, without a warrant, arrest a person
>
> "1. For an offense committed or attempted in his presence, or where * * * (he) has reasonable grounds for believing that an offense is being committed in his presence."
>
> In the situation present, two police officers, as customers within public premises, saw and heard a film, the same film which was exhibited at the hearing. After viewing said film and hearing argument of counsel, this court finds the "absolute" of probable cause to have been present, and also finds the "absolute" of statutory authority to arrest present."

If a police officer can make a warrantless arrest under such circumstances, it must follow that due process is not violated when the arrest is made, as in the case herein, under an arrest warrant issued by a judge who, himself, has seen the film.

For the people to prevail in a warrantless arrest situation against a claim of denial of due process of law, three broad principles of law need only be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. See *New York v. Lake Ronkonkoma Theatre*, 59 Misc.2d 438 at 442 (Mar. 6, 1969).

1. A Law Which Proscribes The Public Exhibition of Obscene Films And Designates The Same To Be a Misdemeanor Crime is Constitutional As A Valid Exercise of The Police Power of the State.

The public policy of the State of New York is strongly aligned against the public exhibition of motion picture films. Section 235.05 of the New York statutes provides for criminal sanctions:

> "Section 235.05, Obscenity. A person is guilty of obscenity when, knowing its content and character, he:
>
> 1. Promotes, or possesses with intent to promote, any obscene material; or
>
> 2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.
>
> Obscenity is a Class A misdemeanor."

The terms of the New York obscenity statute are clearly defined. Section 235.00 provides as follows:

> "235.00 Obscenity; definition of terms.
>
> "The following definitions are applicable to sections 235.05, 235.10 and 235.15:
>
> "1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

"2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

"3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

"4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

The state legislature has made it crystal clear that the statute applies to films such as "Blue Movie," which depict sexual intercourse. New York Penal Law section 410.00 specifically provides that films which are used for "projecting . . . pornographic . . . motion pictures" are contraband and the subject of seizure by a peace officer. New York Penal Law section 410.00 (9) further states.[17]

"9. For the purposes of this section only, a pornographic . . . motion picture, is defined as a . . . motion picture showing acts of sexual intercourse or acts of sexual perversion. This section shall not be construed as applying to bona fide medical photographs or films.."

That conduct, such as was engaged herein, may be lawfully proscribed as a crime under the police powers reserved to the states by the Tenth Amendment to the Federal Constitution is beyond question. See *Alberts v. Calif.*, 354 U.S. 476, 485, 493, (June 22, 1957); reaffirmed by this Court during the 1970 October Term in *U.S. v. Reidel*, 402 U.S. 351, 355, 28

---

[17] As to whether New York Penal Law section 410.00(9) applies to "Blue Movie" see the time-motion study of "Blue Movie" appearing herein pages 26-60.

L.Ed.2d 813, 817, 91 S.Ct. 1400 (May 3, 1971), where this said, at page 355:[18]

> "The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia,

---

[18] Just 15 years ago, a majority of this Court noted that such was the universal judgment. In *Roth-Alberts*, 354 U.S. 475, 485, this Court stated:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored *in the universal judgment that obscenity should be restrained*, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572, 86 L.Ed. 1031, 1035, 62 S.Ct. 766; . . . :" (Our emphasis.)

Were this Court now, when hard-core pornography is so rampant (see footnotes 7 and 8) to apply its reasoning in earlier mass seizure and prior restraint cases, such as *Marcus v. Kansas City Search Warrants*, 367 U.S. 717 (1961) and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (when the presence of obscenity of a lesser degree was only beginning to be felt) it would be guilty of fundamental error, for it would be contrary to the basic truth that this Nation was *not* constructed in a moral vacuum. The possibility of such a basic philosophical error is suggested in the comments of certain of the Justices during argument in *Paris Adult Theatre Inc. v. Slaton* on October 19, 1972 and in recent dictum appearing in the last paragraph of the majority opinion in *U.S. v. Reidel*, 402 U.S. 351, 28 L.Ed.2d 813, 818, 91 S.Ct. 1410 (May 3, 1971) and is epitomized by the last paragraph thereof, reading "Roth and like cases pose no obstacles to such developments." Amicus submits that the contrary holds true and that there is, *as a matter of law*, an inherent civil right which adheres in each citizen by virtue of his national citizenship in this Judaeo-Christian Nation, to be free from the unnatural and debasing influence of hard-core pornography. — at least, that is an advantage which Amicus understood to flow from our heritage, the Nation's obscenity laws and the decision handed down by this Court in *Roth v. U.S.*, 354 U.S. 476, 485 (1957) on the "universal judgment that obscenity should be restrained." See also Justice Harlan's views in *Roth v. U.S.*, *supra*, at 508 re the federal role where hard-core pornography is found.

> rejecting claims that under Stanley v. Georgia, Georgia' obscenity statute could not be applied to booksellers Gable v. Jenkins, 397 U.S. 592, 25 L.Ed.2d 595, 90 S.Ct. 1351 (1970)."

2. Under New York Law, Deputy Inspector Smyth As A Police Officer Had The Authority To Arrest a Person Without A Warrant For A Misdemeanor Committed In His Presence.

At Common Law, an arrest for an offense less than a felony could not be made without a warrant unless it also involved a breach of the peace, using the latter phrase in the narrow sense of a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order. A few of the modern statutes limit the authority of the peace officer to arrest without a warrant for a crime committed in his presence to the same extent as it was limited at Common Law; but in a great majority of the states at the present time, a peace officer has authority under the statutes to arrest for any public offense committed in his presence. Perkins, Elements of Police Science, at 250; 1 Antieau, Modern Constitutional Law, at 262.

This Court has recognized that the states are not precluded from developing workable rules governing arrests to meet "the practical demands of effective criminal investigation and law enforcement." *Ker v. Calif.*, 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623 (June 10, 1963) and in *Johnson v. U.S.*, 333 U.S. 10, 15, 92 L.Ed. 436, 441, fn. 5, 68 S.Ct. 367 (1948) has stated that: "State law determines the validity of arrests without warrants." It has generally been recognized that where a statute so permits, a peace officer may lawfully arrest without a warrant one who has committed or is committing a misdemeanor in his presence or within his view, even thuugh it does not amount to a breach of the peace, 6 C.J.S., Arrests, Sect. 6, at page 589, and such procedures traditionally have been thought to be constitutional. *Johnson v. U.S.*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Following the majority rule, the State of New York, by statute, has granted such authorization to peace officers. See New York State arrest statute, subdivision 1 of section 177 of the Code of Criminal Procedure, cited in the *Lake Ronkonkoma Case*, supra, at page 442:

> "A peace officer may, without a warrant, arrest a person 1. For an offense committed or attempted in his presence, or where . . . (he) has reasonable grounds for believing that an offense is being committed in his presence. . ."

See *New York v. Sessa* 43 Misc.2d 24, 250 N.Y.S.2d 193.

3. Whether A Particular Arrest Is Constitutional or not Depends Upon Whether At The Moment The Arrest Was Made, The Officer Had "Probable Cause" To Make It.

In *Ker v. California*, 337 U.S. 23, 34, 10 L. Ed.2d 726, 739, 83 S.Ct. 1623 (June 10, 1963), it was recognized that, in order for an arrest without a warrant to be lawful under the Constitution, it had to be based upon "probable cause."[19]

In *Draper v. U.S.*, 358 U.S. 307, 3 L.Ed.2d 327, 79

---

[19] While it has been suggested in a different context (in the home) that warrantless probable-cause arrests may not be made in the absence of exigent circumstances and that, given the opportunity, the arresting officer must seek a warrant, the case law in this area holds otherwise. See Mr. Justice White dissenting in an opinion in which the Chief Justice joined in *Coolidge v. New Hampshire*, 403 U.S. 443, 511, footnote 1, 29 L.Ed.2d 564, 609, footnote 1, 91 S.Ct. 2022.

S.Ct. 329 (1959), this Court recognized that "probable cause" as the name implies, involves probabilities; that these are not technicals, but are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act; and that probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

The standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest are at least as stringent as the standards applied with respect to the magistrate's assessment. *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). such standards, however, do not require that quantum or quality of proof which is necessary to establish guilt. "Probable cause" for an arrest may exist even though the person arrested turns out to be innocent. *Henry v. U.S.*, 361 U.S. 98, 102, 4 L.Ed.2d 134, 138, 80 S.Ct. 168 (Nov. 23, 1959).

The question is not whether the person responsible for the arrest thought the facts to constitute probable cause, but whether the Court thinks that such facts constituted probable cause. *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 68 L.Ed. 146, 44 S. Ct. 52 (1924). When the constitutional validity of an arrest is challenged, it is the

---

[20] Petitioner's attack, both in the Court of Appeals below and here, does *not* draw in issue "the facts available to the officer at the moment of the arrest." His argument is that such an inquiry is not apposite, and that, as a matter of law, in a case such as this, no set of facts will justify a warrantless arrest by an officer. See Statement of the Case at page 65 where the trial court pointed out his failure to attack the arrest warrant.

function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offence had been committed. *Beck v. Ohio*, 179 U.S. 89, 13 L.Ed.2d 142, 148, 85 S. Ct. 223 (1964).

4. The Petitioner Is In Error When He Claims That the "Probable Cause" Determination Which Must Precede and Which Authorizes An Arrest for An Obscenity Crime Is The Exclusive Province of The Judiciary and May Only Be Made After An Adversary Hearing.

The Petitioner's attack herein on the arrest does not center on traditional "probable cause" concepts; rather it flows from the highly unorthodox claim that "probable cause" in movie cases may not be determined by either a peace officer, a district attorney, or a judge at an ex parte hearing, and that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a civil court of law.[21] The Petitioner's claim is succinctly stated

---

[21] What is Petitioner prepared to say about the policy of the law which gives the grand jury the right to determine "probable cause?" See Ex Parte U.S., Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283 and 22 C.J.S. Criminal Law, Sect. 345 at p. 893, reading:

> "The finding of an indictment, fair on its face, by a properly constituted grand jury, *conclusively* determines the existence of probable cause. . . ." (Our emphasis.)

See also 22 C.J.S. Criminal Law, Sect. 356, at p. 916, reading:

> "Under the Federal Rules of Criminal Procedure, Rule 30(b)(3) 18 U.S.C.A. where the prosecution is by indictment, constitutes conclusive proof of reasonable cause. . . ."

In *California v. Luros*, 92 Cal. Rptr. 833, 480 P.2d 633 (Feb. 18, 1971) the California Supreme Court reinstated a grand jury obscenity indictment saying, at p. 636:

> "It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See Aday v. Superior Court, *supra*, 55 Cal.2d

(This footnote is continued on the next page)

in the dissent of Justice Brown of the Ohio Supreme Court in *Ohio v. Albini*, 31 Ohio St.2d,27, at 34 (July 5, 1972)[22] wherein he stated the basic proposition to be as follows:

> "The holding of the majority today constitutes an unlawful delegation to the police of the plenary duty of the courts to so determine whether there is probable cause to believe the films obscene after all parties have had an opportunity to express and present to the best of their ability the Roth considerations. Although the seizure of the film in question was incident to an arrest, *the arrest itself* - and hence the seizure - is invalid. In the absence of a prior judicial hearing to determine *probable cause* to believe the film obscene,

---

> at pp. 798-799, 13 Cal. Rptr. 199, 362 P.2d 47.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards." (226 Cal.App.2d at p. 531, 38 Cal. Rptr. at p. 206.)

See also *California v. Cimber,* 76 Cal. Rptr. 382, 384 (Feb. 10, 1969) and *California v. Samblad,* 103 Cal. Rptr. 211, 215 (July 20, 1972).

[22] In the *Albini* case, several members of the Columbus, Ohio Police Department entered the theater, viewed segments of the film, arrested the manager and seized one copy of the film. In affirming Albini's conviction, the Ohio Supreme Court agreed with the rule of law adhered to by the Kentucky Court of Appeals in its judgment in *Roaden v. Kentucky,* 473 S.W.2d 814, cert. granted in 31 L.Ed.2, 815 (Apr. 24, 1972).

The probable cause issue which precedes arrest is an *administrative matter for the law enforcement officer or agency.* See *Ohio v. Shackman,* 278 N.E.2d 61, 63 (May 20, 1971) where the court said:

> "The procedure requested by the defendant would place the court in the position of a law enforcement officer or agency . . . in effect the defendant wants the court, in an adversary hearing to determine if there is probable cause to believe a crime has been committed and that an arrest should be made or evidence seized. *This is not the function of the court.*" (Our emphasis.)

> the arrest is the product of the unlawful delegation of authority. . . . "

Such an argument, however, was foreclosed by *Gable v. Jenkins*, 397 U.S. 592(1970), relied upon by this Court in *U.S. v. Reidel*, supra, at page 355.[23] The basis of the attack in the Federal District Court in Gable v. Jenkins, 309 F. Supp. 998, at 1001, was the appellant's claim that the Georgia statute was "unconstitutional" in that it did not provide for a prior judicial hearing *before arrest*. In *Gable*, The Federal District Court noted that any question as to the admissibility of illegally obtained evidence, seized incident to an arrest, was an independent question which was unrelated to the adversary hearing issue and that, *where a prosecution under the state statute could be "based on other legally obtained evidence," an adversary hearing was not necessary*.

It seems obvious from *Gable v. Jenkins*, that it would have been possible for the State of New York to prosecute Heller and avoid the "adversary hearing" issue by the simple expediency of making the arrest without seizing the film.[24] Under that strategy, the district attorney, however,

---

[23] See also *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, 296-297, affirmed by this Court in *New York Feed Co. v. Leary*, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817; *Gornto v. Georgia*, 178 S.E.2d 894, 896 (Dec. 3, 1970), cert. den. 402 U.S. 933, 28 L.Ed.2d 868, 91 S.Ct. 1525 (Apr. 26, 1971); *U.S. v. Fragus*, 428 F.2d 1211 (5th Cir.). Compare the contrary analysis of *Milky Way* and *Fragus* in *New York v. Morgan*, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) and *Johnson v. City of Rochester, Minn.*, 197 N.W.2d 244, 246 (Apr. 28, 1972).

[24] Several prosecutors, in attempting to avoid the "adversary hearing" hurdle, have abandoned the use of autoptical evidence in favor of the more expedient testimonial evidence and other combinations. See *Calif. v. Goulet*, 98 Cal. Rptr. 782 (Oct. 28, 1971), *Calif. v. Enskat*, 98 Cal. Rptr. 646 (Sept. 21, 1971), *Bryers v. Texas*, 480 S.W.2d 712 (May 31, 1972), *Longoria v. Texas*, 479 S.W.2d 689 (Feb. 16, 1972). Amicus submits that for this Court to

(This footnote is continued on the next page)

would have had to bargain away the use of autoptical evidence (the film) during his case in chief, for the more expedient testimonial evidence of others as to what they saw depicted on the public screen and heard at the time of the arrest.[25]

When faced with this "marshalling of evidence" problem in *Roaden v. Kentucky*, *supra*, involving a warrantless arrest

---

fashion a rule which would make autoptical evidence less available would be a step backward in the advance of police science and the search for truth. See Perkins, Elements of Police Science, referred to in Point IC, *infra*, at page

[25] See *New York v. Morgan*, 326 N.Y.S.2d 976 (Sept. 2, 1971) where a New York police officer paid $5.00 admission fee to the Metropolitan Theater on 14th Street and viewed a film entitled "Anna's Banana," which ran 20 minutes and depicted the following, at p. 978:

> "a female masturbating by use of a cucumber . . . fellatio and cunnilingus . . . followed by an explicit act of sexual intercourse, toward the end of which, the male withdrew his organ and ejaculated in full view on the screen." He arrested the defendant without a warrant *but did not seize the film.* Judge Ringel denied the motion to dismiss, calling the subject matter as described "autoptically obscene" and holding, at page 980: "where probable cause exists to arrest for displaying an alleged hard-core motion picture film to the public an arrest without a warrant is lawful. There is no need for prior judicial scrutiny to validate such an arrest. . . ."

For a reply to Judge Ringel's and Justice Stewart's subjective "I know it when I see it" low watermark, see Federal District Judge Pettine's opinion in *U.S. v. 50 Magazines*, 323 F.Supp. 395 at 402:

> "It is not an overstatement to say that one's own tastes, values and standards have been molded by a set of stimuli which are unique to him and to his cultural milieu, and those standards *inevitably influence one's particular judgment as to what constitutes hard-core pornography. . . .*" (Our emphasis)

Amicus submits that the average American — yes, even a policeman — does know "lewdness" when he sees it. "Lewdness," after all, is what we have been talking about for 15 years, is it not? See *Alberts v. Calif.*, 354 U.S. 476, 488; and Justice Harlan, concurring in *Alberts v. Calif.*, at 501-503, and dissenting in *Lee Art Theatre v. Virginia*, 392 U.S. 636, at 638.

the Kentucky Court of Appeals decided that an obscenity arrest did not call for an exception to the general rule previously expressed by it in warrantless arrest cases in *Kentucky v. Lewis* 217 S.W. 2d 625, 309 Ky 276 (Feb. 1, 1949) that:

> "(2) evidence discovered by a search of the person, or his belongings in his immediate presence, upon his being legally arrested, is competent and admissible; (3) that an officer may lawfully make an arrest . . . if the misdemeanor is committed in his presence - from which it follows that any evidence discovered or found by the officer arresting the misdemeanorant will be competent under rule 2, supra . . . ."

where Kentucky procedure permitted the defendant to contest the issue of probable cause as an ancillary matter in the criminal case by way of motion to suppress or restore, or in an independent civil action to restore the personal property.[26]

Notwithstanding the utter confusion in this area, the Kentucky Court of Appeals' solution in Roaden, supra, is the majority view at the present time. See *Missouri v. Hartstein*, 469 S. W.2d 329, 332-334 (Apr. 12, 1971), reversed on other grounds in *Hartstein v. Missouri*, ___U.S.___, 30 L. Ed.2d 539, 92 S.Ct.___ (Dec. 14, 1971); *Wisconsin v. Kois*, 188 N.W.2d 467, 471 (June 29, 1971), reversed on other grounds in *Kois v. Wisc.*__U.S.__, 33 L.Ed.2d 312, 92 S.Ct.___(June 26, 1972); *Wisconsin v.* O'*Connell*, 192 N.W.2d 201, 205-206 (Dec. 14, 1971); *Ohio v. Albini*, 31 Ohio St.2d 27, 28 (July 5, 1972). See also *New York v. Morgan*, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) cf. *Washington v. Rabe*, 484 P.2d 917, 920 (Apr. 6, 1971) (affidavit and arrest warrant) reversed on other grounds in *Rabe v. Washington*, ___ U.S..____, 31 L.Ed.2d 258, 92 S.Ct.___(Mar. 20, 1972) *New Jersey v. Osborne*, 285 A.2d 43, 46 (D.C.Ct. of Appeals, Dec. 10, 1971) (affidavit and search warrant); *North Carolina v. Bryant*, 183 S.E.2d 824, 825 (Oct. 20, 1971) (affidavit and arrest warrant): *U.S. v. Green*, 284 A.2d 879, 882 (Dec. 20, 1970) (affidavit and arrest warrant); *Scott v. Frey*, 330 F. Supp. 365, 367, (E.D.La., N. Orleans Div., June 30, 1971) (affidavit and arrest warrant); *contra, Johnson v.* City *of Rochester, Minn.*, 197 N.W.2d 244, 247 (Apr. 28, 1972); *Colorado v. Harvey*, 491 P.2d 563, 564 (Dec. 6, 1971); Gl*ass v. 8th Judicial District*, 486 P.2d 1180, 1181, (July 2, 1971). While the California rule is contrary when a particular class of motion picture film is involved, see *Flack v. Municipal Court of Anaheim*, 56 Cal.2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (July 3, 1967), the California procedure authorizes police officer affidavits in support of arrest and search warrants. See *Calif. v. DeRenzy*, 275 Cal. App.2d 380, 79 Cal. Rptr. 777 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 25, 1969. For an outline of the arrest procedure in Los Angeles County, see Federal District Judge Andrew Hawk's opinion in *Schackman* v. *Arnebergh*, 258 F.Supp. 983, 989-990 (Sept. 27, 1966).

---

[26] Following *Mapp v. Ohio* 367 U.S. 643, 6 L.Ed.2 1801, the New York State Legislature added to the Code of Criminal Procedure a new Title II-B (Sections 813-c thru 813-e; Laws 1962, ch 954, effective April 29, 1962) codifying the procedure to procure the return of property unlawfully seized or the suppression of evidence procured in violation thereof. Petitioner herein took no steps to procure the return of the property or suppress the evidence. See Statement of the Case, herein, at page 65.

It is Amicus' basic contention, that in deciding this question, this Court must also keep in focus the due process considerations which *support* the majority rule expressed above and the arguments made herein. Such would include the universal verity that lewdness and obscenity are public nuisances which are abatable under the law, and the ethical values shares by this Nation as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. California*, 332 U.S. 46, 91 L.Ed., 1903, 67 S.Ct. 1672 (Justice Frankfurter's concurring opinion). *Louisiaña ex rel. Francis v. Resweber*, 329 U.S. 459, 470, 91 L.Ed. 422, 67 S. Ct. 374 (concurring opinion) In *Solesbee v. Balkom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected *from the practices in the states*. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death." The relevant historical facts under consideration encompass this Nation's ethical values, as set forth in the well-knit pattern of city, state and federal laws, relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.). New York Penal Law section 410.00 is a crystal clear reflection of those ethical values - values which exist for the benefit of the family unit, which is at the very core of government in our Judaeo-Christian culture.

5. Deputy Inspector Smyth Had "Probable Cause" To Make The Arrest.

(a) Deputy Inspector Smyth Had A Right and Duty Under The New York Statutes To Make A Value Judgement As To Whether The Film Was Obscene.

In *Hosey v. City of Jackson*, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970) the Court said as to the duty to seize a film print under such circumstances:

> "The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officers' presence is not, in this Court's opinion, affected by the holding in Chimel. . . ."

Whether Deputy Inspector Smyth's arrest of the petitioner is constitutional depends upon whether or not at the time of the arrest he had "probable cause" to make the arrest on the obscenity charge. That "factual" issue depends upon two factors (1) the nature of the film itself – the autoptical evidence, which was the subject of the arrest, and (2) the capacity of a peace officer and others to evaluate the obscenity of the film in light of the Roth standards and personal observations. See *Schmerber v. Calif.*, 384 U.S. 757, 769, 16 L.Ed.2d 908, 918, 86 S.Ct. 1826, (June 20, 1966). If it was that brand of pornography which Justice Stewart defined and describes in subjective terms as "I know it when I see it" or that type which several jurists have called "obscene per se,"[27] the film could be said to be at one end of the obscenity spectrum; if it is of a less offensive nature, the autoptical evidence may not speak so loudly, and the film would be somewhere else along the spectrum. To the extent that the capacity of the person evaluating the film may be in issue, Petitioner erroneously assumes that a peace officer, Assistant District Attorney, and a Judge are relegated to a classification which is incapable of making a value judgment in the entire spectrum of such potential evidence,[28] which will satisfy the test enunciated in *Roth v. U.S.*, 354 U.S. 476. The argument which Petitioner urges herein was recently made to the Ohio Supreme Court and rejected in *Ohio v. Albini, supra,* where Justice Herbert, speaking for six of the Ohio Supreme Court Justices, said as to that proposition:

---

[27] The test for obscenity *per se* is stated in *Morris v. United States*, 257 A.2d 341 (Dec. 2, 1969):

> "If reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case in chief need not offer any evidence of national community standards."

See also *Wilhoit v. U.S.*, 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument); *Mitchum v. State of Florida,* 251 S.2d 298 at 301 (Aug. 12, 1971); *U.S. v. Womack,* 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar. 27, 1969); *U.S. v. Wild,* 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, re-hrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); *Mitchum v. State of Florida* 244 S.2d 159, 160 (Jan. 26, 1971); *Collins v. State Beverage Dept.*, 239 S.2d 613, 616; *Marks v. State of Florida,* 262 S.2d 479 (May 23, 1972); *Kaplan v. U.S.*, 277 A.2d 477 at 479 (May 23, 1971); *Illinois v. Ridens,* 282 N.E.2d 691 at 695 (Mar. 21, 1972); *State of Minn. v. Getman,* 195 N.W.2d 827 at 829 (Mar. 17. 1972); Justice Herndon dissenting in *Harmer v. Tonylyn Productions,* 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); *United Theatres of Florida v. State ex rel Gerstein,* 259 S.2d 210, 212 (Feb. 15, 1972); *U.S. v. Miller,* 455 F.2d 899 at 902 (Mar. 22, 1972). See also Justice Sullivan speaking in *Boreta Enterprises, Inc. v. Dept. of Alcohol Beverage Control,* 2 Cal. 3d 85, 84 Cal. Rptr. 113, at 123 (Feb. 26, 1970).

In view of New York Penal Law 410.00,(9), it would appear that "Blue Movie" is indisputably "obscene per se."

---

[28] On that matter, there is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. The case for the police officer was also stated by Common Pleas Judge Pryatel in *Ohio v. Dornblaser*, 267 N.W.2d 434 (Mar. 8, 1971), at 438:

> "Upon review of the authorities, we cast our lot with those who hold that the requirement to conduct adversary hearings on 'obscene' films offered for sale before an arrest or prosecution can be effected is unnecessary and that the absence of such a hearing affects neither the validity nor the legality of the arrest or the indictment that followed.
>
> "To hold that the seller, of the films sought to be suppressed here, should be accorded adversary proceedings before arrest and indictment can be accomplished is to scoff at our obscenity laws and the public they were passed to protect. Nor do we believe that the First and Fourteenth Amendments of the Constitution need be construed to forge a ring of protection around such purveyors of pornography. We see no constitutional reason why these 'salesmen' should be given the consideration of prior adversary hearings for we find no abridgement of their rights or privileges by such denial. It is our opinion that the law should not erect another barrier for the police to hurdle in their already difficult responsibility to curb obscenity and that these purveyors should not be given a prior hearing to ascertain whether their product is sufficiently hard-core pornography to warrant prosecution. Therefore, the Motion to Suppress for lack of prior adversary hearing is overruled."

> "The adoption of appellant Albini's contention in this regard would emasculate the efforts of the General Assembly to discourage those who would profiteer through the commercial exploitation of sex by publicly exhibiting motion picture film, the dominant theme of which appeals to a prurient interest in sex . . . ."

In a footnote at page 28, the Court noted:

> "2. Essentially, it appears to be the contention of counsel for appellants that two trials, each with a full right of appeal, are required for final conviction of an offense of this nature, regardless of whether the facts would otherwise constitute obvious proof of guilt; first, a hearing to determine whether the officer may be permitted to make an arrest, file charges and take physical custody of the obscene material for evidentiary purposes and, second, the criminal trial itself. In response to a question posed during oral argument of this cause, appellant's counsel estimated that a final adjudication of the first hearing in cases such as the one at bar would require at least two years. Moreover, just how the physical evidence could be adduced at this first hearing without prior 'seizure' thereof is not clear since we cannot assume that a potential criminal defendant would freely volunteer to supply such. . . ."

(b) Deputy Inspector Smyth Was Entitled To Rely Upon The Legal Counsel of the District Attorney Who Attended The Movie on July 30, 1969.

Independent of the issue re the capacity of a peace officer (in this case, the Deputy Inspector) to make value judgment of his own as to obscenity crimes, the record demonstrates that other "facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information . . . existed which were sufficient to warrant a man of reasonable caution in the belief that an offense had been committed." *Draper v. U.S., supra.* In the case herein, Assistant District Attorney Beckler viewed the film on the day preceding the viewing by Judge Goldberg, and it was at his request that Judge Goldberg appeared at the Garrick Theater. (See Statement of the Case, page 61.

(c) Petitioner Having Failed To Attack The Arrest Warrant Is Precluded From Denying That "Probable Cause" For The Arrest Existed.

During arguments on the motion to dismiss, following the completion of plaintiff's case in chief, the Presiding Judge noted that the defendant had failed to attack the arrest warrant which, under Amicus' view of the case is the real basis for the seizure and the vital issue herein. In the transcript of proceedings the following colloquy took place at page 49a:

The Presiding Judge: "Wait a minute, you never attacked the warrant unless now – –"

The Defendant's Counsel: "I don't believe I have to attack the warrant."

Having failed to present arguments on that issue, he is now precluded from denying that "probable cause" existed.

B. Petitioner Was Not Deprived of Due Process When The Positive Print Used by Petitioner to Project The Audio Sound and Visual Images Was Seized Incident to the Arrest as Evidence Bearing on the Charge.

1. Legitimate Interests of Society Require That The Autoptical Evidence Used To Project the Audio Sound and Visual Images On the Screen Be Preserved Against Alteration or Destruction.

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence of the crime, namely, the motion picture projection print, be preserved against alteration or destruction; (2) that the motion picture projection print, as autoptical evidence, be favored over the testimonial evidence of law enforcement as to what was seen and heard, inasmuch as faulty judgment resulting from disability in one or more of the senses, may draw in question the integrity of the later, and (3) that the deterrent effect of the criminal laws, which attends public recognition of a peace officer's right to take *immediate* possession of the instrumentality of crime (the motion picture projection print) as evidence, should be given great weight in evaluating defensive tactics which frivolously draw that right in question. In a parallel consideration in *Breithaupt v. Abram*, 352 U.S. 432, 439, 1 L.Ed.2d 448, 453, 77 S.Ct. 409 (Feb. 25, 1957), this Court, in affirming the right of state authorities to extract blood in a warrantless seizure from an unconscious person so as to prove him under the influence of alcohol and responsible for an auto accident, held:

> "*As against the right of an individual* that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind

to which millions of Americans submit as a matter of course nearly every day, *must* be *set the interests of society in the scientific determination of intoxication.* one of the great causes of the mortal hazards of the road. *And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore,* since our criminal law is to no small extent justified by the assumption of deterrence, *the individual's right* to immunity from such invasion of the body as is involved in a properly safeguarded blood test *is far outweighed by the value of its deterrent effect due to public realization that the issue* of driving while under the influence of alcohol *can often by this method be taken out of the confusion of conflicting contentions.''* (Emphasis ours.)

(a) *The Emergent Condition Requires That The Alleged Instrumentality Of The Crime Be Preserved In Its Challenged Form.*

The same emergent condition that was said to exist at the time of the arrest and seizure of a blood sample in *Schmerber v. Calif.*, 384 U.S. 757, 16 L.Ed.2d 908, 919, 86 S.Ct. 1826 (June 20, 1966) presents itself as to evidence in the form of a motion picture projection print when there is an arrest for the exhibition of an obscene film.

It has been said that the film itself is ''indispensable evidence.'' ''Indispensable evidence is that without which a particular fact cannot be proved,'' Witkin, California Evidence, Copyright 1958, at page 5. It is a well known fact that sexually oriented motion picture films are often altered by adding or deleting scenes.[29] The absolute necessity of retaining an exact copy of the content of the film as shown at the time of the commission of the alleged offense is obvious. To require that the film be brought into court or that arrangements be made for a private showing provides no guarantee against cutting or alteration in the interim.[30]

To instruct a state that its police officers or prosecutors, after viewing an obscene film, may not make an immediate arrest, but must leave the theatre and report its contents to a judicial officer, would completely frustrate the state's legitimate right to prohibit the public showing of obscene films.[31]

---

[29] See the remarks of the Presiding Judge Trial Judge Muldow on this issue in Transcript of Proceedings, pages 57a-58a, appearing in Statement of the Case at page 67.

"In *Cambist Films, Inc. v. Duggan*, 298 F.Supp. 1148, 1152, footnote 4 (W.D. Pa.) (Apr. 28, 1969), Federal District Judge Dumbauld pointed to the need for the immediate preservation of evidence:

> "The retention of one print as evidence is reasonable and not oppressive. In view of the fact that the film itself is perhaps the best evidence, or at least indispensable evidence, on the question as to its nature, and of the fact that films are often cut or altered for showing at different theatres, it is important to establish the exact content of the film as exhibited on the occasion giving rise to the prosecution . . . ."

[30] During 1970, Amicus and others assisted the City of Atlanta in a civil action asking for an injunction against the film, "Sandra, the Making of a Woman." On Oct. 16, 1970, the film was viewed by Atlanta, Georgia, law enforcement and on Oct. 21, 1970, a court order was issued and served on the theater, requiring them to bring the film before the court. When the film was finally produced on Nov. 6, 1970, another version was tendered to the court. At least 500 feet had been cut from one of the scenes (5 min.), as was later proved to the court, using a film continuity, the still photographs of which had been taken by law enforcement on Oct. 16, 1970. An attempt, thru depositions, to pin down the responsibility for the cutting was unsuccessful. The trial court finding that the film was obscene was affirmed by the Georgia Supreme Court. The matter did not go beyond the Georgia Supreme Court. Were this Court to uphold the claim of Petitioner herein, the already difficult task of getting an obscenity case to trial would be further complicated by an additional issue: "Which film was shown on the date in question?"

---

[31] See the Colorado experience with the film "Animal Lover" at footnote 7. In *Hosey v. City of Jackson*, 309 F. Supp. 527, 534, 535 (S.D.Miss., Jackson Div.) (Jan. 22, 1970) Federal District Judge Nixon, speaking for the majority of a three-judge Federal District Court, analyzed the social needs in the light of the evidentiary problems present in such cases:

> "The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well known fact that moving picture films may be and often are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the alleged offense is obvious. . . .
>
> "This Court is of the opinion that any judicial hearing prior to the seizure of an allegedly obscene film at the time of exhibition would completely frustrate the purpose and operation of the Mississippi statute prohibiting the exhibition of obscene movies. Certainly, if a prior judicial hearing were required, it would be necessary for the hearing judge to view the film as exhibited on the occasion giving rise to the prosecution. To require a judge to proceed from one theater to another or attend numerous showings of a film at a particular theater with the mere possibility of viewing an obscene version is untenable. Furthermore, to require that the film be brought into Court or that arrangements be made for a private showing of the film in a particular theater provides no guarantees against the cutting or alteration of the film prior thereof. Finally, if police officers, after viewing an obscene film, were required to leave the theater in order to obtain a judicial determination on the question of obscenity by merely reporting the contents to the proper judicial officer, a judicial determination under such conditions would not only be extremely difficult and subject to error, but by the time a seizure could be made, the film might be altered or even shipped to another theater or location. This would be particularly true in so-called 'quickie movies' or 'premiere performances,' the same or any versions of which might never again be shown at the same location. A procedure which is not unreasonable and not oppressive should not be condemned so as to completely frustrate a state's legitimate right to prohibit the public showing of obscene movies.

(This footnote is continued on the next page)

How else may the state obtain the indispensable evidence?[32] In most cases, the state cannot purchase a copy of the film to be used in evidence. Even were this possible, it would be an almost insurmountable task to prove at the trial that the purchased copy is identical to the one which is named as being the instrumentality of the crime.

> "The necessity of the seizure of an obscene movie at the time of showing cannot be compared to the seizure of obscene literature because books or magazines can always be bought and purchased before a court for a judicial hearing before a seizure is accomplished. Furthermore, literature does not enjoy the same possibility of easy deletion and alteration as is the case with a motion picture. Several movements of the cutter's hand can completely change the content of an exhibited obscene version of a movie and thereby eliminate any successful criminal prosecution."

[32] In *Bazzell v. Gibbens*, 306 F. Supp. 1057, (E.D. Louisiana, Baton Rouge Division) (Dec. 9, 1969), Chief Judge West made the following observations as to the interests of society in such matters, at page 1060:

> "To deprive the District Attorney or the State of Louisiana of the right to seize evidence pursuant to a search warrant issued on the basis of probable cause, and to preserve that evidence intact for use during future criminal proceedings, would be to effectively deny the state the right in a case such as this to prosecute at all under a statute already declared to be constitutional . . . ."

and at page 1061:

> "The State could not purchase a copy of the film to be used as evidence as it could in the case of most printed publications. It is absolutely necessary for the State to have a copy of the film in order to properly enforce the statute involved. How else but by seizure could it obtain this indispensable evidence? . . . . It would make no difference insofar as First Amendment rights are concerned whether the possession of such evidence is obtained by the State by virtue of a seizure made pursuant to a search warrant properly issued or by virtue of a court order directing the defendant to deliver the film to the State so that it might be used in preparation for trial. In either case the purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial."

If this Court were to make an exception and, where motion picture films are concerned, limit the right of law enforcement to seize the instrumentality of the crime at the time of arrest, it would be opening another Pandora's Box and inviting another long line of litigation similar to the last 4 years involving the adversary hearing, which followed *Lee Arts Theatre, Inc. v. Virginia*, 392 U.S. 636. In discharging its duty to "preserve" evidence, law enforcement rarely finds itself faced with identical fact situations.[33] If this Court

---

[33] In discharging its duty to "preserve evidence, law enforcement often finds itself faced with fact situations which are "just a little different." In *California v. DeRenzy*, 79 Cal. Rptr. 777, 781 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969, Justice Elkington of the Court of Appeal, First District, Div. 1, pointed out some of the unusual problems which will be affected by this Court's ruling herein:

> "De Renzy's argument in the Superior Court, not emphasized here, that the police nevertheless conducted a mass seizure since they took both non-obscene and obscene material on the same reels, is obviously without merit. Any police attempt, at the place of seizure, to edit and cut hundreds, perhaps thousands, of feet of film without expertise or proper equipment, would be a far greater threat to constitutional and property rights, than was the conduct complained of here . . . . DeRenzy has mentioned, without particularly advocating, the sometimes suggestion that in the absence of an adversary hearing, a magistrate should at least view allegedly obscene film before authorizing a search warrant. No way has yet been pointed out how this is to be accomplished. Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appear by which he may be compelled to bring his film to the magistrate. And even if such a viewing could be arranged before seizure of the film, there would still be no prior adversary hearing as demanded here by DeRenzy, and required, *in proper cases*, by *Books, Marcus and Metzger*. (Their Italics.)

In upholding the seizure of two films taken under an *ex parte* search warrant in *New York v. Steinberg*, 304 N.Y.S.2d 858 (Oct.

(This footnote is continued on the next page)

fashions a new rule, it must then be prepared to sit in judgment on the refinements to the new rule.

The "chilling effect" so easily claimed by defense counsel, is more often than not, imaginary. To honor such arguments in a challenge to the public interest which entrusts a peace officer with the right to take immediate possession of the instrumentalities of alleged crimes, when it is clear that no supportive facts exist therefor, undermines the operations of the criminal law.[34]

2, 1969), Judge Pollack made the following observations on the problems which attend the marshalling of evidence in motion picture obscenity cases in New York City:

> "The state is entitled to prosecute people who exhibit motion pictures which are obscene. In order to prosecute for obscenity they must first seize the films since the best evidence of whether the picture is obscene or not is the picture itself.
>
> "Before the films were seized, Judge Burchell and Judge Wein, at the request of the District Attorney, viewed all the films and trailers at regularly scheduled performances in the Capitol Theatre and then signed the search warrants . . . .
>
> "This is not a massive seizure of books, but a seizure of motion pictures. In the Court's opinion it is less practicable to hold a preliminary judicial adversary proceeding in a case involving motion pictures than in a case involving books. To require a full adversary judicial proceeding prior to the seizure would be unreasonable, and in many cases impractical since by the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant."

[34] In *U.S. v. Pryba, Herman L. Womack, Potomac News Co.*, 312 F. Supp. 466, 468 (Dist. of Columbia) (Apr. 2, 1970), Federal District Judge Pratt, in evaluating such defense tactics where an affidavit alleged "the films depict a man and a female engaged in sexual intercourse, and various sexual activities by males and males, and males and females," made the following comments:

> "Additionally, none of the cases cited by defendants address themselves to the impracticality, not to say impossibility, of holding a prior adversary hearing in the situation at bar where obscene materials surreptitiously placed in the stream of interstate commerce are fortuitously discovered by a civilian employee. In such circumstances, officers, after

(b) *Autoptical Evidence (the Motion Picture Projection Print) Is To Be Favored Over Testimonial Evidence of Peace Officers As To What They Saw or Heard Exhibited On The Motion Picture Screen.*

At least one other jurisdiction has specifically ruled that motion picture films constitute "writings" which, under the California Evidence code, require their production at the

---

the parcel has been repacked, sent on its way; and traced to its destination, should not be required to make the futile gesture of requesting that copies be made available for viewing by a judicial officer prior to the institution of criminal proceedings. That a defendant would cooperate voluntarily is unlikely particularly in a case where hard-core obscenity is involved. Moreover, to believe that the same films would be proffered to the court in the same condition as when first viewed by the employee is to blink reality. To require the prosecution to institute civil proceedings or to issue a subpoena duces tecum would be equally impractical and would render the enforcement of 18 U.S.C. § 1462 virtually impossible. Defendants have suggested no practical method whereby a prior adversary hearing in the instant case could have been achieved.

"Finally, the minimal public deprivation and any chilling effect on the exercise by defendants of constitutionally protected rights were diminished by the Government's proffer of an adversary hearing on the issue of obscenity attempted to be held only five days after the seizure. Had these materials been non-obscene, such a determination could have been promptly made following the seizures and the materials returned to defendants for such public or private display as they desired. Defendants waived the opportunity to participate in this hearing, however, and with it gave up the opportunity immediately to require the prosecution to demonstrate that these materials were obscene and therefore unfit for public consumption. The apparent nature of the films involved supplies convincing reasons for the Defendants' disinterest in having such a hearing.

"In short, we hold that an adversary hearing on the issue of obscenity prior to seizure was not required under the facts of this case."

trial under the "Best Evidence" rule.[35] In *California v. Enskat*, 98 Cal. Rptr. 646, 647, 20 Cal. App.3d, Supp. 1 (Sept. 21, 1971) the Appellate Department ruled that a proper foundation must be laid before secondary evidence would be admitted.[36] In *California v. Goulet*, 98 Cal. Rptr. 782, 783, 21 Cal. App.3d Supp. 1 (Dec. 7, 1971), that same Court recognized, in applying the best evidence rule in a motion picture obscenity case that, in some cases, secondary evidence may be insufficient on its face and require its rejection.[37]

---

[35] The rationale behind the "Best Evidence" rule is stated in Model Code of Evidence, American Law Institute, Rule 602. Comment at page 300 to be: (See also McCormick on Evidence (1954) at page 410; 4 Wigmore on Evidence (3rd Edition, 1940, Section 1179):

> "Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available."

[36] In *Enskat*, the Appellate Department held as follows:

"That there appears to be a 'motion picture' does not alter the fact that a series of single pictures on the film strip, each one a 'writing' is casting an image on the screen.

"Respondent argues, however, that it is not the film, but these light images on the screen, that constitute the offense of exhibiting an obscene motion picture. Respondent argues that as this moving image is unrecorded, it cannot be a writing, and therefore is not subject to the best evidence rule. This argument ignores the essential fact that the moving image is merely the consequence of casting a writing (the film) through a machine. Without the projector and the filmstrip, no moving image is cast at all. The contents of the moving image, 'evanescent' or not, is totally dependent upon the content of the filmstrip. Just as it is better for the trier of fact to read a document than have it described, it is better for the trier of fact to see a movie than have it described. The policy considerations upholding the rule for written documents apply with full force to movies as well. . . ."

The indispensable nature of such autoptical evidence, being the very instrumentality of the crime, is obvious. In a number of cases it has been shown that, unless such evidence is preserved, the prosecution may fail. See *Bryers v. Texas*, 480 S.W. 2d 712 (May 31, 1972) where the Court reversed an obscenity conviction based upon testimonial evidence only, saying at 718:

> "In conclusion we hold that the evidence is insufficient to sustain an obscenity conviction unless (1) the obscene matter, in this case a film, is introduced into evidence, or (2) the defendant expressly and affirmatively stipulates or admits that the material is obscene under the standards stated in Article 527, Section (A)."

In *Longoria v. Texas*, 479 S.W.2d 689 (Feb. 16, 1972) a jury assessed a fine of $1,000.00 and six months in jail for exhibiting four films in Corpus Christi, Texas. At the trial two police officers described several scenes from the films. which showed nude bodies of men and women, acts of sexual intercourse, acts of oral sodomy, other sexual activity and a limited amount of conversation. Neither the films nor any portions or representations of them were introduced into evidence. The Court of Criminal Appeals of Texas reversed the testimony of the officers describing the motion pictures was insufficient evidence for the jury, or the Appellate Court, independently, to determine obscenity. In *Longoria v. Texas*, the Court noted that in *Brown v. State of Texas*, 167 Tex. C.R. 351, 320 S.W.2d 670, a verdict by a jury which had seen the film was reversed on appeal where the record contained nothing to show what the jury saw and what the evidence was.

---

[37] In *Goulet*, The Appellate Department ruled:

> "We return to the major ground of dismissal, that the film in question must be available as evidence, and that verbal description of the contents (or 'secondary evidence') is not admissible. Although this appears to be a case of first impression in this state in the obscenity area, the use of secondary evidence in criminal cases generally has long been recognized (People v. Rial (1914), 23 Cal. App. 713, 139 P. 661; People v. Chapman (1921), 55 Cal. App. 192, 203 P. 126; People v. Powell (1925) 71 Cal. App. 500, 236 P. 311). Such case is also expressly recognized in new Evidence Code (Section 1503) subsection (a).
>
> "To be sure, there may be cases where it is difficult to establish the contents of a film or book by oral secondary showings, particularly where its obscenity may be borderline in character. There may also be cases where the secondary showing may be insufficient on its face and require a court to reject it in its entirety. But we do not reach issues as to the sufficiency of the secondary evidence offered, the sufficiency of the foundation laid for its admission, or the extent to which any common law basis for the use of secondary evidence has been expanded or contracted by the Evidence Code . . . ."

Amicus submits that to prohibit the seizure of autoptical evidence at the time of the arrest would be contrary to general principles of the law which prefer its use – more so, when such is also the very instrumentality of the crime. To do so would impede the marshalling of the most trustworthy, if not indispensable evidence, and would generally frustrate criminal prosecutions.[38] (See footnotes 7, 8 and 10.) In this regard Federal District Judge Nixon, writing for the majority in *Hosey v. City of Jackson*, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), vacated and remanded on jurisdiction in 401 U.S. 987, 28 L.Ed.2d 525, 91 S.Ct. 1221, noted as follows:

---

[38] Suppose a case in which reliable information establishes that an adult male has exhibited "photographs and books (entitled 'Guidebook To Sexual Positions Between Consenting Adult Males by J. J. Proferes') with pictures of nude men performing sodomy and unnatural and perverted sex acts" to a 13-year old boy, immediately after which he performed an act of oral sodomy on the 13-year old, would the police be authorized to seize the book as evidence of the crime, either under a search warrant or incident to his arrest at his home, or would they first have to afford him an adversary hearing? See *Hughes v. Maryland*, 287 A.2d 299, 308 (Feb. 16, 1972). If not there, why then here?

> "The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officer's presence is not, in this court's opinion, affected by the holding in Chimel. To prohibit the seizure of such evidence under these circumstances would completely frustrate criminal prosecution, and necessarily the arrest for a crime witnessed by the arresting officers . . . ."

(2) The Seizure Incident To The Arrest Was Within The Reach Authorized by CHIMEL v CALIFORNIA.

Searches incident to lawful arrest are justified in order to prevent the alteration or destruction of evidence of the crime. In *Preston v. U.S.*, 376 U.S. 364, 367, 11 L.Ed.2d 777, 780, 84 S.Ct. 881 (Feb. 25, 1954) this Court noted:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, *as well as by the need to prevent the destruction of evidence of the crime – things which might easily happen where the weapon or evidence is on the accused person or under his immediate control.*" (Our emphasis.)

See also *Chimel v. Calif.*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (June 23, 1969), where this Court said at page 694:

> "When an arrest is made . . . it is entirely reason-

> able for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab . . . evidentiary items must, of course, be governed by a like rule . . . . *There is ample justification, therefore, for a search of arrestee's person and the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of . . . destructible evidence . . . .*" (Our emphasis.)

It is clear that the search of the projection booth incident to the projectionist's arrest was within the reach authorized by *Chimel v. California, supra.* The projectionist was in the booth from which the audio and visual projections originated, and at the time he was arrested was himself in possession of the motion picture film which was seized. See Statement of the Case at page 63.

Further, it is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be. *New York v. Finkelstein,* 28 Misc. 2d 771, 218 N.Y.S.2d 341, *New York v. Matherson,* 16 N.Y. 2d 509 (Apr. 22, 1965). A search warrant is not necessary, where the object sought by search is visible, open and obvious to anyone within reasonable distance, employing his eyes. *New York v. McKendall,* 30 App. Div.2d 717, 290 N.Y. S.2d 987.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicabil- of obtaining a search warrant. A state is entitled to rely on this Court's express invitation to develop workable rules, governing arrests and searches, based on the principle of reasonableness under all the circumstances of the case.

Ker v. Calif., 374 U.S. 23, 33-34, 10 L.Ed.2d 726, 83 S.Ct. 1623.

There is nothing inherently wrong with a state policy which authorizes a peace officer to make a seizure incident to a warrant or warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action.[39] See also the dissent of Justice White in *Chimel v. Calif.*, 395 U.S. 752, 781-783, 23 L.Ed.2d 685, 89 S.Ct. 2034, 2051-2052, wherein he noted that, "In considering searches incident to arrest, it must be remembered there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights . . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding." Justice Stewart's response to Justice White in *Chimel* at footnote 7 that, "one may initially question whether all of the states in fact provide the speedy suppression procedures the dissent assumes. . . ." provides no satisfactory answer for those states that do. (See footnote 28.) This Court should bear in mind the very real interest the State of New York and other states have in suppressing obscenity and maintaining high moral standards. On the strong legislativeppolicy of the State of New York against obscenity, see Point I A 1, at page 99.

---

[39] Petitioner did not move to regain possession of the film either as an ancillary matter in the criminal proceedings or by separate civil lawsuit. Amicus questions whether Petitioner may now press a First Amendment claim based upon unreasonable previous restraint. See *Johnson v. Common. of Kentucky*, 475 S.W.2d 893, 894 (Dec. 17, 1971), where the Kentucky Court of Appeals said: "Since no such step was taken in the present case, this Court is of the view that these appellants may not now complain that the state authorities retained possession of the film, since they never sought a judicial order for the return of that material. . . ." Not every previous restraint is unlawful. *U.S. v. 37 Photographs*, 402 U.S. 363, 374, 28 L.Ed.2d 822, 833, 91 S.Ct. 2221 (May 3, 1971).

Forty-eight days elapsed between the time that Deputy Inspector Smyth arrested the Petitioner and seized the film "Blue Movie" as the instrumentality of the crime and the return of the verdict that the film was obscene and that Petitioner had knowledge of the obscenity thereof when he exhibited the same. Such restraint as occurred here was clearly within the guidelines set down by this Court in *U.S. v. 37 Photographs, supra*, at 832:

> "Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court . . . .

C. Petitioner Was Not Deprived of Due Process When The Positive Film Print Was Admitted Into Evidence at The Trial.

By waiving a pretrial motion to restore the film print and

"Of course, we do not now decide that these are the only constitutionally permissible time limits. *We note furthermore, that constitutionally permissible limits may vary in contexts, such as a claim by a state censor that a movie is obscene,* the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or bl tween their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." (Our emphasis.)

the preliminary hearing (see Statement of the Case at page) Petitioner is now foreclosed from arguing First Amendment principles.

It is clear from the foregoing principles and authorities that the public policy requires that the positive film print which was used to project the images and sound, being the instrumentality of the alleged crime, be preserved intact and introduced as evidence for the consideration of the trier of fact in its determination on the issue of guilt or innocence. Whether as "best evidence" or as "indispensable evidence" the search for objective truth requires that law enforcement investigators ferret out and preserve the same so that the law may be honestly administered. In Elements of Police Science, copyright 1942, Foundation Press, Inc., Professor Rollin Perkins comments on the duties and responsibility of law enforcement investigators in such matters, at pages 44 and 50:

> "It is impossible to give all of the rules for conducting every variety of investigation which the police are called upon to make, but there are some rules which have general application. They are . . . 21. A search must be made for all clues to aid in establishing the fact that a crime has or has not been committed, as for evidence which will not only prove useful in iden-
>
> well as for evidence which will not only prove useful in identifying and convicting the perpretrator, *but also aid in eliminating innocent suspects* . . . 25. During the progress of the general survey, *everything must be observed with maximum attention.* A *Chinese saying, 'The eyes see only what they look for, and look for what is already in the mind,'* is particularly applicable in the field of investigation . . . 26 . . . . In an important case

recently tried, the omission of these details and *the non-observance of important evidence almost resulted in the execution of an innocent person.* . . 36. All movable evidence must be carefully wrapped or placed in suitable containers, sealed, and marked with the identification symbol with the following notations thereon: The place from whence taken, the date and time, the names of witnesses to the act, the name and number of the report, and the name of the person who removed the evidence . . . 37. Every article taken must be handled and packed so that all characteristics will be preserved from the moment of collection until presented to the expert for examination or introduced by the investigator at the trial. *All evidence must when presented in court show a complete chain of its custody from the time it was first taken into possession until presented as evidence. The courts have continuously held that evidence must be identified with the place of discovery, that it be uncontaminated, and unchanged in character. . . .*'' (Our emphasis.)

The Prosecution fully complied with all of the requirements of the law. During its case in chief, the District Attorney offered in evidence the positive film print which was seized, and showed a complete chain of its custody from the time it was first taken into the possession of Deputy Inspector Smyth at the time of the arrest until received in evidence as Exhibits 1 (see Statement of the Case at page 63.

D. The Past Decisions Of This Court Do Not Support Petitioner's Claim That The Denial Of An Adversary Hearing Prior To A Seizure Which Is Incident To Arrest Amounts To The Deprivation Of A Fundamental Constitutional Right.

Until this Court's *per curiam* reversals in May and June of 1967, the defense attorneys lacked the courage to advance the arguments now made herein – i.e., that the failure to have an adversary hearing on the issue of the obscenity of a film, prior to arrest and seizure, amounts to a denial of due process. For an example of the standard defense tactic used prior to that time, see *Schackman v. Arnebergh*, 258 F. Supp. 983 (Sept. 27, 1966) wherein one of the defendants in *Schackman v. Calif.* brought a *collateral civil action in the federal district court* seeking a declartory judgment that the films involved in the state criminal prosecution (D-15, 0-7, 0-12) were not obscene and asking for an injunction against enforcement of the California Statute. The aura of respectability given to such materials by the 1967 reversals and this Court's summary reversal of the criminal conviction in *Lee Art Theatre v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968),[40] was to change all this and, in opening Pandora's Box, set free a can of worms which has been plaguing law enforcement for four years.

---

[40] The *Lee Art Theatre* case was decided on the last day of the 1967 October Term and without benefit of briefing on the merits or oral argument. The petition therein, *Lee Art Theatre, Inc. v. Virginia*, No. 977, October Term 1967, shows that the central issue was the seizure of the two films under the search warrant. The facts did not include the issue of a seizure incident to an arrest. The very substantial difference between *Lee Art Theatre* and the case herein is apparent. See Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Here there was no search – the seizure of the film whose presence was obvious to everyone being incident to the arrest.

Petitioner objects to the seizure of the motion picture film "Blue Movie" viewing obscenity as a unique area, requiring special treatment. Such arguments are drawn out of context from language of certain members of this Court in *Marcus v. Kansas City Search Warrants*, 367 U.S. 71 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) and subsequent lower court decisions which, in misapplying such language, erroneously hold that a judicial determination of obscenity in an adversary proceedings is constitutionally required before a motion picture film may be seized as evidence for a criminal prosecution.

The *Quantity of Books* case concerned not a criminal prosecution, but an auxiliary means of attacking obscene materials – *civil suppression of all copies* through injunction, a form of relief given limited approval in *Kingsley Book, Inc. v. Brown*, 354 U.S. 436. Such injunction statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. *Quantity of Books* was, therefore, an example of a civil procedure presenting the problem (as four members of the court saw it) of unconstitutional prior restraint. In *Quantity of Books*, it was the civil process which was imperfect, and that decision sought only to bring the civil procedure up to the level of the criminal process. It did not declare that the regular criminal procedures were outmoded.

The *seizure of all copies* as in *Quantity of Books*, pursuant to injunction may impinge directly on the *First Amendment*, whereas a seizure of a single copy, as evidence antecedent to a criminal prosecution, is cognizable under the *Fourth Amendment*. Civil remedies proceed directly against a publication, the sole issue being the nature of the publication; in the criminal proceedings, however, the issue is not suppression of books, but whether the defendant, by his conduct has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure of publications becoming a gathering of evidence of the defendant's actions, and being purely incident to the arrest.

Misunderstandings placed upon the *A Quantity of Books* decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution, have brought about a rash of bad law and chaos in this area of law.

Unfortunately, one of the first and best cases in this contentious area of the law went unreported for 14 months. See *East Village Other, Inc. v. Koota*, finally reported in 305 F. Supp. 1159 (Feb. 13, 1968). In his opinion at page 1162, Judge Dooling correctly interpreted *Marcus v. Kansas City Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books, v. Kansas*, 378 U.S. 205 (1964), and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and their relationship to the lower court obscenity decisions of *Potwora v. Dillon*, (CA2), 386 F.2d 74 (Nov. 14, 1967), and *Evergreen Review, Inc. v. Cahn* (EDNY 1964), 230 F. Supp. 498, which were the leading federal cases on mass seizures at the time of Judge Dooling's decision.

The subsequent decisions were to lose themselves in the confusion flowing from the language in the *Marcus* and *A Quantity of Books* cases. The reasoning which led to the illogical results reached in *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968), *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185 (No. Dist. Ill. 1968); *Cambist Films, Inc. v.*

Tribell, 293 F. Supp. 407 (E.Dist.Ky. 1968); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969), and *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969) failed to take into account the limited previous restraint condition which had been generally accepted in the federal custom cases and was finally upheld in *U.S. v. 37 Photographs*, 402 U.S. 363 (1971).[41] See e.g., *U.S. v. 56 Cartons of Magazines Entitled Hellenic Sun*, 373 F.2d 635 (4th Cir. 1967); *U.S. v. A Motion Picture Film Entitled "491"*, 367 F.2d 889 (2d Cir. 1966); *U.S. v. One Book Entitled "The Adventures of Father Silas,"* 249 F.Supp. 911 (SDNY 1966); and *U.S. v. A Motion Picture Film Entitled "Pattern of Evil,"* 304 F.Supp. 197, 199 (Sept. 2, 1969). *Contra, U.S. v. 18 Packages of Magazines*, 238 F.Supp. 846 (N.D.Cal. 1964). See also the discussion of these cases on this point in *U.S. v. Brown*, 274 F.Supp. 561, 565 (Oct. 18, 1967), where the Court said:

> "Although the government does not urge their application here, something should be said about the recent spate of cases involving the constitutionality of Sec-

---

[41] This Court should take judicial notice of the fact that there has never been a serious claim to a right to exhibit a film while the same was being *timely* pursued in the federal courts on an "obscene libel" charge. Compare *U.S. v. Unicorn Enterprises, Inc.*, 403 U.S. 925, 29 L.Ed.2d 704, 91 S.Ct. 2241 (June 15, 1971) (Language of Love). If not in the federal jurisdiction, why should there be a different rule in state cases – particularly here, where the "prompt judicial decision by the trial court" was reached 48 days after the arrest and seizure? *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142, 19 L.Ed.2d 966, 969, 88 S.Ct. 754 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690, n.2, 20 L.Ed.2d 225, 235, 88 S.Ct. 1298 (1968). Compare the procedure followed by Suffolk County District Attorney Byrne, commented on in the dissenting opinion of Justices Brennan, White and Marshall in *Byrne v. Karalexis*, 401 U.S. 216, 220, 27 L.Ed.2d 792, 796, 91 S.Ct. 777 (Feb. 23, 1971).

tion 305 of the Tariff Act of 1930, 46 Stat. 688, as amended, 19 USC Section 1305 (1964) *which permits customs officials to hold and inspect allegedly obscene imports to determine whether forfeiture proceedings should be instituted.*" (Our emphasis.)

It was unfortunate that the first major decision in this area was a criminal prosecution which had some of the aspects of the mass seizure, civil process, prior restraint cases. In *Metzger v. Pearcy*, 393 F.2d 202, the Marion County Prosecutor on Oct. 25, 1967, made arrests at three outdoor movie theaters where the film, "I A Woman" was shown, and seized the prints being used by the three exhibitors. A fourth arrest was made by the Indianapolis Police Department on Nov. 2, 1967, in connection with its showing at an outdoor theater in that city, where that print also was seized. All four seizures were by police officers without arrest or search warrants, incident to an arrest for a misdemeanor committed in their presence. Six months later, when the Court of Appeals ruled on the matter, *the criminal cases had not yet come to trial.*[42]

In *Metzger v. Pearcy, supra*, the Circuit Court of Appeals for the Seventh Circuit, held that an adversary hearing was necessary before the motion picture film could be seized incident to an arrest for a misdemeanor committed in the officer's presence. The court ordered the film returned, but at the same time required that the exhibitor make it available to the County Prosecutor for the trial of the criminal prosecution – a somewhat inconsistent result. The Marion County

---

[42] Compare the facts herein. Heller was arrested on July 31, 1969. The Trial Court decision was handed down forty-eight days later, on Sept. 17, 1969.

Prosecutor announced that he was unable to prosecute the the criminal case because of the break in the chain of evidence. It is submitted that the fundamental error of *Metzger v. Pearcy* appears at page 204, where the court stated:

> "The lessons of Books is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment of the Constitution of the United States, and is a prior restraint condemned by the Supreme Court. . . ."

The court was thinking of the four prints which were seized in *Metzger v. Pearcy* and (very likely) the delay in trying the criminal case, and equated the multiple seizure in that case to the multiple seizure in *A Quantity of Books*, without further analysis, i.e., inquiring whether the state procedures in such criminal cases, as in New York, authorized a speedy adversary hearing immediately after the seizure to permit the cognizable court to focus searchingly on the obscenity issue. Compare the California rule which authorizes just such a procedure in *Holden v. Arnebergh*, 71 Cal. Rptr. 401 (Aug. 21, 1968); appeal dismissed in *Holden v. Arnebergh*, 22 L.Ed.2d 112 (Mar. 3, 1969), and the speedy procedure herein.

Thereafter, the Fourth Circuit Court of Appeals, relying on *Metzger v. Pearcy* and its faulty rationale, extended the *Quantity of Books* result as far as to say that a search warrant may not issue to seize a film as obscene, even when the issuing judge has himself taken the trouble to view the subject matter prior to his issuance of the search warrant. *Tyrone, Inc. v. Wilkinson, supra.* In the Second Circuit, Federal District Judge Pollack of the U. S. District Court for the Southern District of New York, however, held to the contrary on almost identical facts. *208 Cinema, Inc. v. Vergari*, 298 F.Supp. 1175 at 1177 (May 5, 1969); *Rage Books, Inc. v. Leary*, 301 F.Supp. 546, 549 (July 1, 1969).

In *Delta Book Distributors, Inc. v. Cronvich*, 304 F.Supp. 662 (July 14, 1969) (E.D.La., New Orleans Div.) reversed on other grounds in *Perez v. Ledesma*, 401 U.S. 82 (Feb. 23, 1971), Justice Boyle in a 2-to-1 decision, with Justice Rubin dissenting, wrote an opinion that went the *Pearcy* decision one better – that court indicated an adversary hearing was necessary *even as to material which had been purchased by the People*. The court footnoted that statement with the remarkable observation:

> "Of course, the defendants cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto had passed."

In his dissent, Justice Rubin voiced a more rational solution, at page 673:

> "In considering searches incident to arrest, it must be remembered, Justice White said in his dissent in Chimel v. California, 1969, 395 U.S. 752, 782-783, 89 S.Ct. 2034, 2050-2051, 23 L.Ed.2d 685, 'that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights . . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding.'
>
> "That in my view is all that the state is required

to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite, there should be no rule in criminal law – even by virtue of the protection accorded to freedom of speech – that every peddler of pornography is entitled to one free assay at scatology.

"Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of obscene materials to minors, in Ginsberg v. New York, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195, or when it upheld another conviction under the New York statute for 'hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.' Mishkin v. New York, 1966, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. It is obviously impossible to hold a 'prior adversary hearing' with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in Ginzburg v. United States, 1966, 383 U.S. 462, 86 S.Ct. 942, 16 L.Ed.2d 31, under an indictment charging violation of the federal obscenity statute."

See also, the excellent opinion of Federal District Court Judge Frankel, speaking for a three judge court in *Milky Way Productions v. Leary*, 305 F.Supp. 289, 295-297 (Oct. 15, 1967), affirmed on the merits in *New York Feed Co. v. Leary*, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817 (Feb. 27, 1970).

There is a plethora of conflicting decisions at the present time following one or more of the above authorities, some of which have resulted in open confrontation between state and federal courts of the order which resulted in the enactment of 28 U.S.C. Sections 2281 and 2284. (See footnotes 6, 8 and 10 herein.) One comes away from a study of these cases with the conclusion that the results obtained depend not on established principles of law but rather upon the personal philosophy of the members of the court writing the opinion. Nowhere is it more apparent than in the study in contrast of the opinions of the District Court of Appeal upholding a seizure of the film "Sexus" without a search warrant in *Flack v. Anaheim Judicial District*, 56 Cal. Rptr. 162 (Feb. 3, 1967), and the California Supreme Court overruling that decision in *Flack v. Anaheim Municipal Court*, 59 Cal. Rptr. (July 20, 1967). The former opinion recites the traditional role of the police officer in making arrests on probable cause, at page 165:

> "It is settled law that an officer has the right and duty to arrest without a warrant for a misdemeanor committed in his presence; and to seize property by means of which the crime was committed. (Citation.) Here, the theater where the arrest and seizure were made was open to public patronage. The arresting officers had the right to enter along with other members of the public. The film in question, which was shown on the screen to the patrons assembled, was deemed by the viewing officers to be contraband, whereupon they arrested appellant and seized the film as an incident to the arrest. No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make the lawful arrest accompanied

> by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in Roth v. U.S., ..."

The California Supreme Court reversed, enunciating a new policy and different rule.[43]

Amicus submits that a state is not required to follow the California procedural rule and create exceptions to the traditional right of a police officer to seize evidence incident to an arrest. See Point IA4, *supra*, at page 105. If the state judiciary prefers to test the officer's judgment *after arrest*, by providing for an immediate adversary hearing procedure *after arrest*, there can be no serious claim of a constitutional infringement. If for no other reason than practicality and necessity, such procedures must prevail. See *Holden v. Arnebergh*, 71 Cal.Rptr. 401 (Aug. 21, 1968) where an attack was made on the Los Angeles City Attorney's law enforcement methods and California procedure which permits an officer to arrest and seize material incident to an arrest but requires an *immediate adversary hearing after the arrest on the issue of probable cause*, if the arrested party so desires. In his motion to dismiss the *Holden* appeal in the United States Supreme Court the City Attorney asked the following questions of this Court:

---

[43] For the past 10 years, the obscenity decisions of the California Supreme Court have been dominated by the liberal thinking of its justices. See, for example, Justice Tobriner speaking in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (July 2, 1963) and *in Re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655 466 P.2d 535 (Nov. 14, 1968); Justice Mosk speaking in *Barrows v. Municipal Court*, 1 Cal. 3d 821, 83 Cal. Rptr. 819, 464 P.2d 483 (Jan. 30, 1970), and the dissenting opinions of Justices Tobriner, Peters and Mosk in *People v. Luros*, 4 Cal.3d 84 at 93, 92 Cal.Rptr. 833 at 839, 480 P.2d 633 (Feb. 18, 1971); *Dixon et al. v. Municipal Court of City and County of San Francisco*, 267 Cal. App.2d 875 73 Cal.Rptr. 587, 590 (Jan. 29, 1969), and *Landau v. Fording*, 245 Cal. App.2d 872, 54 Cal.Rptr. 177 (Oct. 24, 1966), the last of which was affirmed on the merits by this Court in *Landau v. Fording*, 288 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct.2d 109 (June 12, 1967). The *Flack* rule, decided in July of 1967, was a product of that liberal influence and a forerunner to the claim herein that there must be an adversary hearing before arrest and seizure. The absence of any discussion in *Flack* regarding the latter controversy is evidence of the recent origin and newness of such claims.

> 1. Will the task of reviewing each of the hundreds of items now reviewed by the prosecuting attorneys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdication of responsibility owed to the public at large to control the spread of pornography?
>
> 2. Can the courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material . . . ?
>
> 3. Will the court's preemption of the task now assigned by statutory law to prosecuting attorneys in deciding what is or is not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decisions in Redrup v. N.Y. . . . ?
>
> 4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials when the volume and quantity of such materials renders prior judicial scrutiny a barrier to public protection. . . ."

The City Attorney's motion to dismiss was granted. See *Holden v. Arnebergh*, 22 L.Ed.2d 112 (Mar. 3, 1969).

II

THE MOTION PICTURE FILM "BLUE MOVIE" IS NOT PROTECTED EXPRESSION UNDER THE FEDERAL CONSTITUTION. ON THE CONTRARY, IT IS CONDEMNED BY IT.

A. The Motion Picture Film "Blue Movie" is Obscene In The *International Sense* (Hard-Core Pornography) And As Such is Condemned Under The Federal Constitution.

In its opinion in *Roth-Alberts*, 354 U.S. 476, 1 L. Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957, this Court noted that it was the *universal judgment of civilized nations that obscenity should be proscribed.* See *Roth-Alberts* at p. 484:

> ". . . implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is *mirrored in the universal judgment that obscenity should be restrained*, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. . . ." (Our emphasis.)

If government is to have meaning, the laws must be interpreted according to the cultural base from which the law is drawn. According to that base "indecency" does have a concrete value. This Court has not yet seen fit to overrule *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) It is a "Judaeo-Christian" culture which this Court is called upon to interpret. If the laws of the land, according to that "Judaeo-Christian" base, uniformly proscribe public indecency, then each citizen has and enjoys a personal right under that government to live in an area which is free of public indecency. Amicus submits that, for this Court to refuse to acknowledge and enforce that value is to fail to recognize civil rights in the citizenry accruing and existing under the Fifth, Ninth, Tenth and Fourteenth Amendments of the Federal Constitution and the corresponding sections of the State Constitution – civil rights which are enforceable under the law, irrespective of whether or not criminal penalties are attached.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws. Such confusion[44] is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to and brief reflection on the moral laws of this Nation dealing with sexuality, as codified by the state legislatures (see Appendix B pp. 1-16 is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971); and *State of Ohio*

---

[44] The Court in *People v. Kirkpatrick*, 316 N.Y.S.2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

> "There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made its masterpiece' (Macbeth, Act II).
>
> "The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance . . ."

ex rel. Keating v. Vixen, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971). Amicus submits that the public policy declaration of the New York State Legislature, making motion picture films showing acts of sexual intercourse, contraband under New York Penal Law section 410.00, and establishing the right to seize "equipment" (the print), and providing for statutory forfeitures in connection with such exhibitions,[45] is incontestable proof of the proposition that such public mores do exist, and strong support for the rationale employed by the Ohio Supreme Court in the *De Loreto*, supra, *Wilhout A. Stitch*, supra, and *Vixen*, supra, cases. See also *Wisconsin v. Voshart*, 159 N.W.2d, 8 (June 7, 1968) and the Georgia Supreme Court speaking recently in *Evans Theatre Corp. v. Slaton*, 180 S.E.2, 712 (Mar. 4, 1971); *Walter v. Slaton*, 182 S.E.2d 464 (May 13, 1971); *1027 Peachtree Corp. dba Metro Theatre v. Slaton*, 184 S.E.2d 144 (Oct. 7, 1971) and *Paris Adult Theatre v. Slaton*, 185 S.E.2d 768 (Nov. 5, 1971).

This Court cannot disregard the plain meaning of the English language. How can Petitioner hope to prevail with his claim that "Blue Movie" is protected material under New York law and the federal constitution when one considers that New York Penal Law section 410.00(9) specifically states:

> "For the purposes of this section only, a porno-

---

[45] New York Penal Law section 410.00(8) provides for a statute of limitations of two years on a cause of action for damages for a wrongful seizure under the statute. Given such a remedy, how can Petitioner, on balance, be heard to complain about the impact of such a seizure. See the opinion of Justice Harlan, writing for a majority of five on the views of this Court re forfeiture for illegal activities in *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2 434, 91 S.Ct. 1041 (Apr. 5, 1971).

> graphic . . . motion picture, is defined as a . . . motion picture showing acts of sexual intercourse . . . This section shall not be construed as applying to bona fide medical photographs or films . . ."

On this rhetorical question see, in particular, the time-motion of "Blue Movie" at pages 26 to 60.

1. THE COMMON STANDARDS OF RIGHT AND WRONG EMBODIED IN THE STATUTORY LAW OF THIS NATION AND THE STATE OF NEW YORK SHOULD BE APPLIED AS THE RULE OF LAW IN THIS CASE IN FINDING THE "BLUE MOVIE" TO BE OBSCENE AS A MATTER OF LAW.

It is the basic contention of Amicus that the eyes of this Court, in reviewing the New York Supreme Court ruling below, should be focused upon the concepts which support the statutes being applied by Respondents, that is the universal verity that lewdness and obscenity are public nuisances, which are abatable under the law, and the ethical values shared by this Nation, as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. A state-by-state survey of the Nation's laws dealing with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity is attached as Appendix "B". . Amicus submits that these laws define the national standards which everyone in the courtroom today is seeking to ascertain. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. Calif.*, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter concurring opinion). *Louisiana ex rel Francis v.*

Resweber, 329 U.S. 459, 470, 91 L.Ed.422, 67 S.Ct. 374 (concurring opinion). In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325, handed down on the same date as the *Roth-Alberts* decision, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), Justice Frankfurter, in speaking for the majority of that Court in a case interpreting the New York obscenity statutes said, at page 1473:

> "In an unbroken series of cases extending over a long stretch of this Court's history, *it has been accepted as a postulate* that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U.S. at 716." (Our emphasis.)

In *Solesbee v. Balkcom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected *from the practices in the states*. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death."

In reviewing the ruling of the New York Supreme Court which held "Blue Movie" to be hard-core pornography as a *matter of law*, this Court should judicially recognize that it was in the background of this Nation's well-established and shared ethical values that the producer and exhibitor of that film opted to move into the motion picture entertainment field and capitalize commercially via sensationalism, upon the natural abhorrence of civilized government to public displays of explicit sexual conduct. *One just does not fornicate in public, be it actual or simulated* – nor may he on the public screen. (See Judge Burke's opinion, infra at page 152.) The relevant historical facts under consideration certainly encompass this Nation's ethical values, as reflected in the well-knit pattern of city, state and federal laws relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture and are deserving of this Court's strong support.

The common standards of right and wrong embodied in the statutory law of New York should be applied as the rule of law in this case in upholding the New York Supreme Court's finding that the film "Blue Movie" is UNLAWFUL AS A MATTER OF LAW. This was the view of the unanimous Ohio Court in *City of Youngstown v. De Loreto*, 251

N.E.2d 491 (September 10, 1969). In *De Loreto*, the court enumerated the state statutes and city ordinances which prohibited specific immoral conduct. From that the court deduced what the Moral Standards of Ohio People on Sex were. (See *De Loreto* at pages 500 and 501. See also *Ohio ex rel Ewing v. "Without A Stitch,"* 276 N.E.2d 655 at 659 (July 9, 1971) and *Ohio ex rel Keating v. "Vixen,"* 272 N.E. 2d 137 at 141 (July 21, 1971).

It is the prerogative and duty of this Court to take judicial notice of the laws of the State of New York and of this Nation relating to sexual morality and apply them in reviewing the issue of obscenity in this case.

The vast history of the common law and the statutes of the State of New York make clear those particular areas of public conduct which are so immoral, so contrary to the immemorial custom of propriety of the people, so opposite to the natural sense of conscience and justice of the people, so pervasively at odds with the community notions of right and wrong, so consistently maintained as illegal and contrary to Anglo-American public policy that their display and exhibition to the public, either live or recorded, is UNLAWFUL AS A MATTER OF LAW. Obscenity, public indecency, incest, lewdness, immoral exhibitions, sexual perversion, and sodomy et seq., all are enumerated acts the public portrayal of which a judge should recognize as being part of the common law specification of "obscenity." See Appendix B - 10 "New York."

The courts have always been willing to take judicial notice of those facts and policies that are of general and incontrovertible knowledge. Such matters include those facts of a common or general knowledge that are well and authoritatively settled, not doubtful or uncertain, and known to be within the limits of the jurisdiction of the court. (28 Am. Jur.2d Sec. 34) They also have included a recognition of the ordinary instincts, passions, emotions, and motives which universally, in a greater or lesser degree, influence the actions and conduct of mankind. (28 Am.Jur.2d Sec. 114) In addition, judicial notice has been extended to matters of public and social welfare (29 Am.Jur.2d Sec. 143) and the customs and usages of man which are generally known or accepted to an extent sufficient to make them matters of common knowledge. (28 Am.Jr.2d Sec. 121)

2. THE PERFORMANCE OF SEXUAL INTERCOURSE IN PUBLIC, WHETHER REAL OR SIMULATED, LIVE, OR AS PART OF A MOTION PICTURE FILM OR STAGE PLAY IS AGAINST PUBLIC POLICY AND AS SUCH IS OBSCENE PER SE:

By far the best legal opinion on this point of law is that of Judge Burke speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964), at page 857:

> "While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amend-

ment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 72 S.Ct. 383, 97 L.Ed. 946). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834). For example, in People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, supra, app. dsmd. for want of a substantial federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

"Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation' (Giboney v. Empire Ice & Storage Co. supra, 336, U.S. p. 501, 60 S.Ct. p. 690, 93 L.Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen . . . ."

And at page 860:

> "In Kingsley Intern. Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 2 L.Ed.2d 1512, the opinion of the court repeatedly distinguishes between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S.Ct. p. 1365, e L.Ed.2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray *acts* of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' '360 U.S. p. 702, 79 S.Ct. p. 1372, 3 L.Ed.2d 1512; emphasis in original).
>
> "It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibition as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged, dissenting in Roth v. U.S. . . . in contrasting books with conduct: 'I assume

there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws. c.40, §§ 43, 1140, 1140-a, 1140-b). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretation, never, obviously, the First Amendment. (Miller v. People, 5 Barb. 203; People v. Burke, 243 App. Div. 83, 276 N.Y.S. 402, affd. 267 N.Y. 571, 196 N.E. 585; People v. Mitchell, 296 N.Y. 672, 70 N.E.2d 168; People v. Dash, 282 N.Y. 632, 25 N.E.2d 979.)

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive – more properly, obscene – displays of conduct whether in the street (Penal Law, §§ 43, 1140, 1140-b), on the street (Penal Law, § 1140-a; People v. Vickers, 259 App. Div. 841, 19 N.Y.S.2d 165 – lewd dance) or on the screen (Penal Law, §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see Stromberg v. California, 283 U.S. 369, 51 S.Ct. 532, 75 L.Ed. 1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in People v. Stover, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, People v. Vickers, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law, §§ 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious – that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in

> which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S. Ct. 1304, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle, stated at page 863 is a complete answer to the suggestion of petitioner that "redeeming social importance" has been established through the testimony of defense witnesses Parker Tyler (See Statement of the Case, pages 65-70), Charles Winick (Statement of the Case, pages 70-77) and Thomas Phillips (Statement of the Case, pages 77-82.

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays, Since no other profession is privileged to bend public morals, public and law to its internal craft standards, then neither should producers of films."

A majority of the California Supreme Court appear to be in agreement with Justice Burke. See *Billie Dixon, Richard Bright and Michael McClure v. Municipal Court of City and County of San Francisco*, 267 Cal. App.2d 875, 73 Cal. Rptr. 587 (Dec. 2, 1968). Hearing denied January 29, 1969, (with Justices Peters, Tobriner and Mosk dissenting) involving the stage play "The Beard." Justice Devine, speaking for an unanimous court (Court of Appeal), First District, Division 4) said at page 589:

> "There are several sexual acts which, although not criminal in themselves, as is oral copulation, doubtless would be deemed by many a trier of fact applying First Amendment standards to be obscene even when contained in a play or a dance or other performance with full First Amendment protection. It is entirely possible that the simulation of such acts, and of the act in 'The Beard,' would itself be an obscene act. The positions and motions of the performers, the duration of the act, the accompanying dialogue and all of the circumstances, taken together with the content of the entire work, may establish an imitation of an actual deed to be obscene.

The same principle was recently voiced by the Georgia Supreme Court in its decision in *Evans Theatre Corp. et al. v. Slayton (supra)* holding the motion picture film "I Am Curious (Yellow)" to be enjoinable as a public nuisance because of the sexual activity portrayed therein:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the

majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.*" (Our emphasis.)

3. WHERE OBSCENITY PER SE EXISTS THE COURT CAN TAKE JUDICIAL NOTICE OF SUCH FACT AND NO FURTHER EVIDENCE ON SUCH ISSUE IS NECESSARY.

In *Mitchum v. State of Florida*, 251 So.2d 298 (Aug. 12, 1971) the District Court of Appeal of Florida made the following comment as to the application of judicial notice to material which was incontrovertibly obscene

> "Examination of appellants' argument under this point indicates that the real issue raised is the contention that the absence of testimonial evidence, separate and apart from the magazines themselves considered as exhibits, renders the order of the lower court prejudicially erroneous and therefore reversible.
>
> "In support of the latter proposition, appellants rely heavily on Justice Frankfurter's concurring opinion in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, reflecting his view, not that of the court, that expert testimony is necessary to a finding of obscenity by a court. That view being found only in a concurring opinion is, of course, not binding upon us as precedent nor are the holdings in the obscenity cases from several of our sister states which require testimonial evidence as a predicate for a finding of obscenity necessarily binding on this court. We have

read them, of course, and while they appear sound and scholarly, they simply do not reflect our view of the law relating to the subject matter. In essence, those cases encroach upon the entire concept of judicial notice as approved by our courts as well as those of other jurisdictions. *Long ago, it was held that in proper circumstances 'judicial notice' is superior to evidence since it fulfills the object which evidence is designed to fulfill and makes evidence on the point established by judicial notice unnecessary*. Amos v. Moseley, 74 Fla. 555, 77 So.619. It is designed as the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. United States v. Hammers, D.C., 241 F. 542. Courts are presumed to know what everyone knows, 13 Fla. Jur., Evidence § 14. Thus, the question resolves itself into whether the materials here involved are of such character as to establish circumstances whereunder the court may determine the obscenity question without evidence. (Emphasis ours.)

"We hold that the materials herein are 'hard-core pornography' and therefore within the rule announced in United States v. Wild, 422 F.2d 34 (2d Cir. 1970) cert. denied 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, reh. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720. There the government introduced no evidence other than the materials themselves which was claimed to be error. In rejecting the contention, the Court of Appeal reviewed the pertinent cases and held as follows: * * *.

"In a remarkably similar case in which a conviction under section 1461 was unanimously affirmed, Judge Prettyman wrote:

"'"Most of the difficulty which enshrouds the discussion of the law concerning obscenity and filth develops upon consideration of books and magazine articles. Here arise problems of scienter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary community standards in similar matters, and other baffling problems under our precious right of free speech, discussed in several opinions in Smith v. California (361 U.S. U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205). But we have no such problem in the case of bar. These are stark, unretouched photographs – no text, no possible avoidance of scienter, no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of the material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are "utterly without redeeming social importance," * * * *

"'*We think that photographs can be so obscene – it is conceivably possible that they be so obscene – that the fact is incontrovertible.* These photographs are such. United States v. Womack (Womack v. United States), 111 U.S. App. D.C. 8, 294 F.2d 204, 205-206 (footnote omitted), cert. denied 365 U.S. 859, 81 S.Ct. 826, 6 L.Ed.2d 822 (1961).' (Emphasis ours.)

"See also, Kahm v. United States, 300 F.2d 78 (5th Cir.), cert. denied 369 U.S. 859, 82 S.Ct. 949, 8 L.Ed. 2d 18 (1962); United States v. Davis, 353 F.2d 614 (2d Cir. 1965), cert. denied 384 U.S. 953, 86 S.Ct. 1567, 16 L.Ed.2d 549 (1966). Cf. Manual Enterprises v. Day, 370 U.S. 478, 489-490 and n. 13, 82 S.Ct. 1432, 8 L.Ed.

2d 639 (1962) (opinion of Harlan, J.) * * * *

"(5,6) The above views expressed by the court in Wild were adopted by this court in the informative opinion of this court in Collins v. State Beverage Department, 239 So.2d 613 (Fla. App. 1970). It is clear then that the rule in this jurisdiction is that if the materials before the court are what is termed 'hard-core pornography' no testimonial evidence is necessary to support a finding of obscenity * * * *."

In *Morris v. U.S.*, 257 A.2d 341 (Dec. 2, 1969) the Court voiced the following test for material which was "obscene *per se*," i.e., obscene as a matter of law:

"Although the definition and elements of obscenity have been authoritatively stated in *Roth* and *Memoirs*, definition of the oft-used terms 'hard-core obscenity, and 'obscenity per se' has been neglected by the Supreme Court. The Court of Special Appeals of Maryland has faced this problem before and has defined these terms in the following language: Hard-core pornography or obscenity per se is obscenity which 'focuses predominantly upon what is sexually morbid, grossly perverse and bizaare without any artistic or scientific purpose of justification.' There is no desire to portray (it) in pseudoscientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose (is) to stimulate erotic response. . . . No proof, other than the viewing of it, is required to determine if it is, in fact, obscene.

"It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra; Hudson, supra. *In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification*, then the Government on its case-in-chief need not offer any evidence of national community standards." (Our emphasis.)

See also *Wilhoit v. U.S.*, 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument). *Mitchum v. State of Florida*, 251 S.2d 298 at 301 (Aug. 12, 1971); *U.S. v. Womack*, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar. 27, 1969); *U.S. v. Wild*, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, rehrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); *Mitchum v. State of Florida*, 244 S.2d 159, 160 (Jan. 26, 1971); *Collins v. State Beverage Dept.*, 239 S.2d 613, 616; *Marks v. State of Florida*, 262 S.2d 479 (May 23, 1971); *Kaplan v. U.S.*, 277 A.2d 477 at 479 (May 10, 1971); *Illinois v. Ridens*, 282 N.E.2d 691 at 695 (Mar. 21, 1972); *State of Minn. v. Getman*, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice

Herndon dissenting in *Harmer v. Tonylyn Productions*, 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); *United Theatres of Florida v. State ex rel Gerstein*, 259 S.2d 210, 212 (Feb. 15, 1972); *U. S. v. Miller*, 455 F.2d 899 at 902 (Mar. 22, 1972).

In *Boreta Enterprises, Inc., v. Dept. of Alcohol Beverage* 2 Cal. 385, 84 Cal. Rptr. 113 at 123 (Feb. 26, 1970), Justice Sullivan writing for a majority of the California Supreme Court, acknowledged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "*per se*" contrary to public morals, at page 123:

> "This, however, is not the focal point of our present inquiry. We here examine the power invested by the Constitution in the Department to revoke a specific alcoholic beverage license 'if it shall determine *for good cause* that the . . . continuance of such license would be contrary to public . . . morals . . . .' (Cal. Const. Art. XX, § 22, italics added; see fn. 4, *ante*.) This requires us to observe the distinction between the imperatives of the moral order and the mandates of the civil order. It is therefore the *public* morals, not the *private* morals of the officials or employees of the Department, however conscientious or well-intentioned, which must be the criteria in the instant case. In other words, in resolving the issue before us, our reference must be to the morals of the people, that is, to those of the community at large, of the whole body of the people. (See Duskin v. State Board of Dry Cleaners (1962), 58 Cal.2d 155, 163, 23 Cal. Rptr. 404, 373 P.2d 468; see definition of 'public,' Black's Law Dictionary (4th ed. 1951); Webster's Third New International Dict. If by 'morals' we mean 'the moral practices of an indi-

> vidual, or culture; habits of life or modes of conduct' (Webster's op. cit., see 'moral') we think the term 'public morals' must be taken to mean the moral practices or modes of conduct 'pertaining to a . . . whole community; . . . relating to . . . the whole body of people or an entire community.' (Black's Law Dictionary, *supra*; Duskin v. State Board of Dry Cleaners, *supra*.)
>
> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is *per se* contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." (Italics theirs.)

In *Smith v. Commonwealth of Kentucky*, 465 S.W.2d 918, 920 (Feb. 26, 1971) the Kentucky Court of Appeals similarly followed the same rules:

> "Appellant moved for a directed verdict of acquittal at the close of the Commonwealth's evidence, on the ground that no proof had been presented to show that the questioned matter was utterly without redeeming social value. The court properly overruled that motion, inasmuch as *the publication demonstrated on its face that it possessed no such redeeming social value. That determination was properly made as a matter of law in the circumstances of this case . . . .* " (Our emphasis.)

4. THE SUPPRESSION OF "BLUE MOVIE," THRU CRIMINAL PROSECUTION, IS NOT "THOUGHT CONTROL." THE INTEREST BEING PROTECTED IS THE PEOPLE'S RIGHT TO CONTROL "PUBLIC MORALITY" – A TENTH AMENDMENT RIGHT, GUARANTEED BY THE BILL OF RIGHTS.

Petitioner's argument that the suppression of "Blue Movie" is "thought control" (Brief for Petitioner at page 21) overlooks the fact that the Bill of Rights encompasses the first *ten* amendments to the federal constitution.

(a) THE RIGHT TO PROSCRIBE OBSCENITY IS A TENTH AMENDMENT RIGHT, GUARANTEED BY THE BILL OF RIGHTS WHICH RESERVES TO THE STATES AND TO THE PEOPLE THE RIGHT TO CONTROL AND REGULATE "PUBLIC MORALITY" *i.e.*, PUBLIC CONDUCT, WHICH AFFECTS THE PEOPLE AS A WHOLE. OBSCENITY CONTROLS DO NOT ATTEMPT TO CONTROL THOUGHT OR REACH "PRIVATE MORALITY."

Obscenity controls do not attempt to reach *private morality* such as what a person may read or see. The proscription of obscenity is grounded upon the legitimate governmental aim of controlling and regulating "*public morality*" – public conduct, which affects the people as a whole.

Although it is true that the governmental restraints imposed by such obscenity laws must, of necessity, *indirectly* restrict the availability of such materials for some persons who might wish to see movies, such as are involved herein, that same result is obtained whenever any "vice" laws are enforced, such as those proscribing prostitution. It would be, however, a gross distortion of the law to suggest that

this indirect effect on private morals is the *basis* for such criminal sanctions and thus an unconstitutional infringement on the rights of an individual.

Law and morality are not identical. Although interrelated, they are necessarily distinct. Not every moral evil is proscribed by man-made law. *Public* morality is to be distinguished from *private* morality, as to which it is often said, the law does not concern itself. On the other hand, our law has always recognized the importance of maintaining a high *public* morality.

Nowhere was the function of such "vice" laws more clearly stated than in the arguments of the prosecutor two and one-half centuries ago in the first obscenity conviction in *Rex v. Curl*, 2 Strange 789 (1727):

> "3. As to Morality. Destroying that is destroying the peace of the government for government is no more than public order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; *but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the Temporal Courts* (Common Law courts) *and bawdy houses are.* In Sir Charles Sedley's case it was said, that this Court is the custos-morum of the King's subjects. 1 Sid. 168." (Our emphasis.)

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows, in 63 Columbia Law Review, Morals Offenses, and the Model Penal Code (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L.Ed.2d 38, fn. 12; page 39, fn. 14, page 41, fn. 19; *Mishkin v. N.Y.*, 16 L.Ed. 2d 53, fn. 9; and *Stanley*, 394 U.S. 557, fn. 10) at page 671:

> "But the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people . . . . it is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism."

And at page 672:

> "If unanimity of strongly held moral view is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law . . . ."

Mr. Schwartz continues, at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying, 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraint we seek to cultivate through family, church, and school.' *The interest being protected is not* directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, *but the right of parents to shape the moral notions of their children, and the right of the general*

public not to be subjected to violent psychological affront." (Our emphasis.)

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, this Court said in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety . . . ." *(Our emphasis.)*

See also, Federal District Judge Peirson Hall speaking on "The Monster Vice" in *U.S. v. Four (4) Books*, 289 F. supp. 972 at 973 (Sept. 10, 1968), cited herein at p. 18 footnote 15.

The existence of the vice of obscenity is the symptom of a disorder which probability tells us, will lead to ruin. Historian Arnold Toynbee tells us that 19 out of the 21 great civilizations which flourished in world history, crumbled into ruin . . . not because of armed aggression from without but because of moral decay from within. In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wallace 441, 450 (1874) had the following to say about the nature of the underpinnings of this Nation:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of history . . . ."

In sum, the case for the governmental action against obscenity was stated by the Associate Justice Harlan in his concurring opinion in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (June 22, 1957), at page 502:

> "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards . . . ."

The long range indirect effects inference, accepted by Mr. Justice Harlan, was acknowledged by a majority of this Court in *Ginsberg v. N.Y.*, 390 U.S. 629, 20 L.Ed.2d 195, 86 S.Ct. 942, where the Court referred to the observations of psychiatrist Dr. Gaylin (with apparent approval) at page 642, fn. 10:

> ". . . but despite the vigor of the ongoing controversy whether obscene material will perceptively create a danger of anti-social conduct, or will probably induct its recipient to such conduct, a medical practitioner recently suggested that the possibility of harmful effect to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the view of some psychiatrists in 77 Yale Law Review at 592-593, said:
>
> > "'It is the period of growth (of youth) when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a

> workable sense of self, when sensuality is being defined and fears elaborated, when pleasure controls it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.'

"Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

> "'Psychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, *and the permitting of the reading of pornography, which was conceived as potentially destructive.* The child is protected in the reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. *To openly permit implies parental approval and even suggests seductive encouragement.* If this is so of parental approval, it is equally so of societal approval – another potent influence on the developing ego.'"

It seems obvious to Amicus herein that, in the context employed, those members of this Court who joined in that opinion must have recognized the "indirect" effects on public morals in the nature of a scandal-giving seduction, i.e., "public nuisance."[48]

---

[48] If "to openly permit" traffic in obscenity is "seductive encouragement" and "potentially destructive" to "the period of growth of youth . . . when sensuality is being defined," and if it is the universal judgment of civilized nations that obscenity should be proscribed, how can any member of this Court give voice to the sentiment (even by way of suggestion) that the commercial

(This footnote is continued on the next page)

A nation whose public morals are preoccupied with sex is thought to be sick. The ultimate evil would be a society in which sex pictures, novels and magazines are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery, and sex language in every dialogue. To the extent that we have attained that status, we must acknowledge that we have lost control of public order and are closing the gap on the public morality of the ancient community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.. Recognizing that the evolution of man in civilized society is a slow-moving process, Amicus respectfully suggest that the individual members of this Court should examine and consider the suggestion that in the biblical days of Sodom and Gomorrah there must have been justices whose liberal views on public morality contributed to the destruction of those two cities. It matters not that in our present morally weakened society, there are many members of our "adult" community who may personally find it difficult to maintain high principles. In a civilized society hypocrisy is the compliment that vice pays to virtue.

During the past two years, the above stated concepts relating to the legitimate interest of government in controlling

---

exhibition of obscenity to consenting adults is constitutionally permissible, without giving scandal and transgressing the "good behavior" requirement of Article III Section 1 of the federal constitution. So that this inquiry may be brought into clear focus, consider that proposition in the light of the subject matter currently being given wide distribution in the United States — such as "Animal Lover" appearing in Appendix C, pages 1-22.

and regulating "public morality" have been subjected to a constant and determined attack, under a claim that the Federal Constitution required that obscenity should be immune where commercially exhibited to consenting adults in an enclosed theater. This erroneous misconception, voiced by petitioner in his brief at page 21 and arising out of an interpretation placed on the recent decision of the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (Apr. 7, 1969) was finally laid to rest on May 3, 1971, by this Court's decisions in *U.S. v. Reidel* 402 U.S. 351 and *U.S. v. Thirty-Seven (37) Photographs* 402 U.S. 363 and *U.S. v. Reidel*, Justice White, speaking for six members of the Court, said at page 815:

> "Section 1461 of Title 18, U.S.C., prohibits the knowing use of the mails for the delivery of obscene matter. The issue presented by the jurisdictional statement in this case is whether §*1461* is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are adults. The District Court held that it was not. We disagree and reverse judgment."

and at page 816:

> "In *Roth v. United States*, 354 U.S. 476 (1957), Roth was convicted under §1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press' id., at 485, and that §1461, 'applied according to the proper standard for judging obscenity, do(es) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' Id., at 492. Roth has not

been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

"Stanley v. Georgia, 394 U.S. 557 (1969), compels no different result. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in Roth. Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this Court, a question neither involved nor decided in Roth. The Court made its point expressly: 'Roth and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in Stanley questioned the validity of Roth insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of §1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States

> District Court for the Northern District of Georgia rejecting claims that under Stanley v. Georgia, Georgia's obscenity statute could not be applied to book sellers. Gable v. Jenkins, 397 U.S. 592 (1970)."

In *U.S. v. Thirty-Seven (37) Photographs (supra)* the same majority of six came to an identical holding in a case involving the right of the Federal Government to seize obscene materials at the point of entry into this country and to institute a civil action in the federal courts to declare the subject matter to be contraband and subject to forfeiture. Mr. Justice White, writing for four members of the Court, held as follows, at page 833:

> "We next consider Luros' second claim, which is based upon Stanley v. Georgia, supra. On the authority of Stanley, Luros urged the trial court to construe the First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read Stanley as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305(a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.
>
> "The trial court erred in reading Stanley as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In United States v. Reidel, ante, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography.

> In this case, neither Luros nor his putative buyers have rights which are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let aloneneither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country . . . ."

Amicus emphasizes the relevance and importance of U.S. *v. Reidel* and *U. S. v. Thirty-seven (37) Photographs*, to the issues raised on this appeal and the major problem confronting this Nation insofar as the runaway nature of "public lewdness" on the public screen and elsewhere is concerned. (See pp 25-60 and Appendices A, and C thru "I".) It is now quite clear from those decisions that (1) actual prior restraints by way of court order, for a reasonable period of time in advance of a final determination of the legal issue by the trial court and after decision by the trial court are constitutional, and (2) no property interest attaches to obscene materials which are possessed for commercial use and (3) the obscene materials can properly be made the subject of forfeiture as contraband.

In Amicus' view, it is inconceivable that all of the issues herein are not already decided by this Court's opinions in *Reidel* (supra) and Thirty-seven (37) Photographs (supra). The forty-eight (48) day period between seizure of the film "Blue Movie", at the time of the execution of the arrest warrant, and the final decision of the trial court, is well within the principles established in those cases.

(*b*) THERE IS A JUSTIFIABLE GOVERNMENTAL GROUND FOR THE REGULATION OF OBSCENITY BY STATES IN WHATEVER FORM IT MIGHT TAKE, EITHER CRIMINAL OR CIVIL.

The power of the State in the area of public morals is broad. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed2d 1169, 77 S.Ct. 1325 (June 24, 1957) decided on the same date as *Roth-Alberts*, 354 U.S. 476, Justice Frankfurter had the following to say concerning the power of states in this area, at Page 440:

> "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 238 US at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. Alberts v. California, decided this day (1 L.ed2d 1948). The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of Section 22-a.

"We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 310 US 141, 148, 84 L.ed1124, 1128, 60 S. Ct. 879, 130 ALR 1321. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. Just as *Near v. Minnesota*, 283 US 697, 75 L.ed1357, 51 S.Ct. 625, supra, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 US at 708, it likewise made clear that the protection even as to previous restraint is not absolutely unlimited.' Id, 283 US at 716. To be sure the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

1. UNDER THE COMMON LAW, OBSCENITY, INDECENCY AND LEWDNESS WERE THE SUBJECT OF CRIMINAL SANCTIONS AS A PUBLIC NUISANCE.

Obscenity or indecent exhibitions of a nature to shock the public sense of decency were a public nuisance and indictable at the Common Law. *Crain v. State*, 3 Inc. 193 (1951). In Perkins on Criminal Law, Foundation Press, 1954, Professor Rollin Perkins states, at page 336:

> "Obscene or indecent exhibitions of a nature to shock the public sense of decency are also public nuisances and indictable at Common Law. This label includes not only obscene and indecent theatrical performances or side shows, but other disgusting practices such as letting a stallion to mares in the streets or some other public place . . . ."

For a modern application of this principle to some of the current problems which face this Nation, see *Bloss v. Paris Township*, 157 N.W.2d 260 (Apr. 1, 1968) holding the operation of an outdoor drive-in theater showing motion pictures which "dwell on the subject of sex and the human anatomy" to constitute a public nuisance. In *Bloss*, the Michigan Supreme Court stated the following, as to the nature of such public nuisances, at page 261:

> "What is a public nuisance? Joyce, Law of Nuisances, Section 7, page 15, defines a public nuisance, inter alia, as an act which offends public decency. Cited to Section 66, page 13, is the case of Hayden v. Tucker, 37 Mo. 214, in which it was held that the keeping of jacks and stallions within the immediate view of a private dwelling and a public highway is a nuisance

> which equity will enjoin as a 'disgusting annoyance perpetually bringing the blush of shame to modesty and innocence.' The factual difference between the Hayden and the instant case, is that there involved was a display of equine and here pictures of the human frame, is not a distinction calling for a different conclusion as to the nuisance question."

Similarly, in *Cactus Corporation d.b.a. The Apache Drive-in v. State of Arizona, ex rel Murphy*, 480 P.2d 375 (Feb. 9, 1971), the Court of Appeals of Arizona, Division 2, recently affirmed the judgment of the trial court which permanently enjoined The Apache Drive-in Theater from displaying, showing or running a motion picture film, entitled "Lysistrata," or any other motion picture film of the same character, on the grounds that such activity is or would be a public nuisance as defined by A.R.S. Sect. 13-601, which defines, in part, a public nuisance as:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons . . . ."

"On March 4, 1971, the Georgia Supreme Court, in an unanimous decision, upheld the *inherent right* of law enforcement officials to enjoin the motion picture film "I Am Curious (Yellow)" as a public nuisance. In *Evans Theatre Corp. et al. v. Slayton, Dist. Atty. of Fulton County*, Ga. , 180 SE.2d 712 (Mar. 4, 1971), Presiding Judge Mobley, speaking for an unanimous court, said:

"We recognize the principle that equity will take no part in the administration of the criminal law. Code §

55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: Lofton v. Collins, 117 Ga. 434 (3), 440 (43 SE 708, 61 LRA 150); Walter v. McNelly, 121 Ga. 114 (1), 115 (48 SE 718); Edison v. Ramsey, 146 Ga. 767 (92 SE 513); Dean v. State, 151 Ga. 371 (1) (106 SE 792, 40 ALR 1132); Gullatt v. Collins, 169 Ga. 538 (150 SE 825); Rose Theatre, Inc. v. Lilly, 185 Ga. 53 (1) (192 SE 866); Atkinson v. Lam Amusement Co., 185 Ga. 379 (195 SE 156); Forehand v. Moody, 200 Ga. 166 (36 SE2d 321); Norris v. Willingham, 204 Fa. 441 (50 SE2d 22); Thornton v. Forehand, 211 Ga. 568 (87 SE2d 865); Lee v. Hayes, 215 -Ga. 330, 331 (110 SE2d 624).

"The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

"A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public." In the *Evans Theatre Case*, this Court denied review. See Evans Theatre Corp. et al v. Slayton, Dist. Atty. of Fulton County, U.S. 30 L.Ed.2, 267 S.Ct. (Nov. 9, 1971). See also Judson v. Zurhorst, 30 Ohio Cir. 9, at Page 14, where the Ohio court said:

"There remains one contention for the granting of this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency.

"In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mail . . . ."

In *State of Ohio ex rel Keating v. A Motion Picture Film Entitled "Vixen" et al.*, 272 N.E.2d 137 (July 21, 1971), Amicus, as a private citizen, brought an abatement action against the exhibition of the motion picture "Vixen" in Cincinnati, Ohio (Hamilton County) under Section 3767.01 et seq., of the Ohio Revised Code, which authorizes a private party to bring such action. In that trial, the statute was upheld as against a claim of constitutional invalidity and the exhibition of the film at an indoor movie was held to be a public nuisance in Hamilton County. An appeal to the Court of Appeals, First Appellate District of Ohio, a similar attack was made against the statute on constitutional grounds, and as applied to the film itself. On July 20, 1970, the Court of Appeals, First Appellate District of Ohio upheld the constitutionality of the statute the principle involved and after trial *de novo*, declared the exhibition of the film to be a nuisance in the counties of Ohio in which it had jurisdiction. The Ohio Supreme Court affirmed the lower court's judgment and that matter is presently before this Court. On March 13, 1971, the Clerk of the Court was directed to obtain the film for the Court's viewing.

Section 3767.01 et seq., of the Ohio Revised Code was recently before a 3-judge federal district court, convened under 28 U.S.C. Sections 2281-2284, upon a claim of the unconstitutionality of such statute. In that case, *Grove Press, Inc. et al. v. Anthony B. Flask*, 325 F. Supp. 574 (March 10, 1970), the court, in an unanimous decision (Celebreezze, Battisti and Green), upheld the constitutionality of the statute and its application in an abatement of the motion picture film, "I Am Curious (Yellow)" as a public nuisance. On July 6, 1970, Grove Press, Inc. filed its appeal in the United States Supreme Court. See *Grove Press, Inc. v. Flask*, October Term 1970, No. 360. As of this date, no action has been taken by this Court in this matter.

On the issue of whether indecency in the form of public lewdness in theatrical performances can be stopped in a civil action to abate a public nuisance in California, see *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 P.464 (June 14, 1916). In *Weis*, that issue was before the District Court of Appeals, 2nd District, on a writ of prohibition. The District Attorney had commenced a civil action under Code of Civil Procedure, Section 731, to abate a theatrical performance on the ground that it was a public nuisance. The complaint alleged that under a concession granted by the Panama-California International Exhibition, the defendant was conducting upon the exposition grounds a public resort and place of amusement and entertainment, known as the "Sultan's Harem," in which certain women did make in the presence of the general public a public exhibition and exposure of their naked person and private parts, which performance was alleged to be indecent and offensive to the senses and a public nuisance. The California court dismissed the defendant's application for a preemptory writ holding the action was properly brought. At page 465, the court said:

> "While the acts here complained of clearly constitute a crime, *they also constitute a nuisance within the meaning of Section 3479 of the Civil Code*, which defines a nuisance as 'anything which is . . . indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property . . . .' (Emphasis ours.)
>
> "And Section 3480 of the same Code defines a public nuisance as: 'One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or danger inflicted upon individuals may be unequal.'
>
> "Mr. Joyce in his work on Nuisances, Section 409, says: 'A disorderly and disreputable theater may be enjoined although a common nuisance.'
>
> "To the same effect is Wood on Nuisances, Section 68, where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.'"

The *Weis* decision and rationale was cited with approval by the California Supreme Court in *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472 (Nov. 27, 1941). In the *Lim* case, the California Supreme Court noted, at page 476:

> "Similarly in Weis v. Superior, 30 Cal. App. 730, 159 P.464, it was held that the District Attorney of San Diego County was authorized under Code of Civil Pro-

> cedure, Section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisances in Civil Code Section 3749 . . . . The courts have thus refused to grant injunctions on behalf of the State *except* where the objectionable activity can be brought within the terms of the statutory definition of public nuisance . . . ." (Our emphasis.)

The theatrical performance in *Weis* was in the nature of a "concession" on the Exposition grounds. The latter fact infers that the performance was a commercial activity and was not visible to the public's eye without the payment of an admission price. See the recent decisions of this Court in *U. S. v. Reidel* 402 U.S. 351 (May 3, 1971) *Thirty-Seven (37) Photographs* 402 U.S. 363 (May 3, 1971) which accord no constitutional protection to such commercial activities.

More recently, the California Supreme Court indicated *in dictum* that it presently adheres to the Common Law rule noted above. In *Burton v. Municipal Court of the Los Angeles Judicial District of Los Angeles County*, 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (June 6, 1968), a licensing case involving the exhibition at a theater of films claimed to be obscene, that Court cited with approval the Abatement Statute which codifies the principle employed by the Georgia Supreme Court. While denying the right of an *administrative board* to refuse a license on an *administrative* fact finding that the theater was a nuisance, the court pointed to the *judicial* Abatement Statute as a proper *procedural* employment of the "nuisance" concept. At page 726, the court said:

> "'⁸Section 103.31(b), under which the board may deny a permit '*for a business which has been or is a*

public nuisance' is likewise defective. The Civil Code defines a nuisance as 'Anything which is injurious to health, *or is indecent* or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ** public park, square, street, or highway * * *.' (Civ. Code § 3479) *Section* 3480 defines a public nuisance as 'one which affects at the same time an entire community or neighborhood, or any number of persons * * * *.' *(See also, Pen. Code,* §§ 370, 371.*)*

"The provisions of Section 103.31(b) are no less vague than those of Sections 103.29(b) and 103.31(c) 1. *To permit a board to refuse to grant a license for the operation of a motion picture theater because in its subjective opinion the operation may be 'indecent or offensive to the senses* * * so as to interfere with the comfortable enjoyment of life or property of 'any considerable number of persons' obviously vests in the board an exorbitant quantum of discretion and *fails to meet the constitutional requirement of narrowly circumscribed standards.*

"[16] *We note in passing that the law provides ample methods for eliminating the existence of a nuisance by indictment or information, or by the bringing of a civil suit or an action for abatement.* (Civ. Code § 3491) It is, of course, within the *authority of a municipal legislative body to prescribe what constitutes a nuisance.* (Gov. Code, § 38771; City of Bakersfield v. Miller (1966), 65 Cal. 2d 93, 100, 48 Cal. Rptr. 889, 410 P.2d 393.) However, the policy board is not a legislative agency, and *we are not concerned here with whether particular activity has been properly defined as a nuisance but only with whether an administrative board may refuse to grant a permit to petitioners because in its subjective opinion the business which they operate 'has been or is a public nuisance.'"* (Our emphasis.)

In *People ex rel Hicks v. "Sarong Gals"* 103 Cal. Rptr. 414 (Aug. 3, 1972) the Court of Appeal in California was faced with a case involving subject matter which differed from the type of conduct herein, only, in that there the "lewdness" was "live," rather than "filmed." In upholding the application of the Red Light Abatement Law to abate, as a nuisance, continuing acts of lewdness sans evidence of prostitution, the Court held at page 417:

> "The behavior described in the instant case amounts purely and simply to an exhibition calculated to arouse latent sexual desires and release the inhibitions of the viewers rather than a mode of expressing emotion and dramatic feeling by the performer.
>
> "While our Supreme Court has held that amusement and entertainment as well as the expression of ideas are encompassed within the right of freedom of speech (In re Giannini, *supra*, 69 Cal.2d 563, 569, 72 Cal. Rptr. 655, 446 P.2d 535; Weaver v. Jordan, 64 Cal.2d 235, 242, 49 Cal.Rptr. 537, 411, P.2d 289), entertainment value per se does not give an activity redeeming social importance. Presumably, the Romans of the First Century derived entertainment from witnessing Christians being devoured by lions. Given the right audience, the spectacle of a man committing an act of sodomy on another man would provide entertainment value. However, neither this spectacle nor the activities described in

> the instant case are invested with constitutionally protected values merely because they entertain viewers. However chaotic the law may be in this field, no court has as yet adopted such an extreme result.
>
> "Public display such as those described above are within the type of public nuisances traditionally within the power of the state to regulate and prohibit. They involve no significant countervailing First Amendment consideration. Attempts to present this type of commercialized lewdness under the mantle of the First Amendment under a concept of communication of ideas stretches reason.
>
> "We hold that the "entertainment" described in the instant case is lewd and, therefore, not afforded the protection of freedom of speech under the First Amendment. The acts of the "entertainers" or "dancers" in the instant case were purely and simply obscene acts performed for the purpose of inciting the sexual desires and imaginations of a group of randy, beer drinking patrons. As such, these acts amount to conduct not protected by the First Amendment. The prevention of these acts does not hinder the market place of ideas or freedom to distribute information and opinion."

In answering arguments that the legislature did not intend the statute to encompass that type of activity, the court said at page 416:

> "Defendants contend that when the Red Light Abatement Law was enacted (1913), the Legislature did not have in mind the type of activity described above.[3]
>
> "This is apparently true. History does not record the existence of any topless-bottom-less bars offering the type of entertainment described herein in 1913.

> Western folklore has it that prostitutes were good-hearted wenches who bedded their customers with no shilly-shallying around, nursed the sick in times of emergency, eventually married homesteaders and became pillars of the community. However, even prior to 1913, the exploitation of sexual desires for profit was apparently recognized as a social problem. Thus the Legislature specifically included lewdness as one of the grounds of the court's power to curb a public nuisance. In People v. Bayside Land Co., 48 Cal.App. 257, 191 P. 994, the court held that lewdness – even though no incidents of prostitution or assignation had occurred – came within the Red Light Abatement Law."

Carried as a footnote, the Court also made the following observation:

> "It can be argued with equal persuasion that the authors of the First Amendment to the United States Constitution would be more than a trifle shocked were they to discover some of the more bizarre behavior now protected by that amendment's lofty concept of freedom of speech."

CONCLUSION

For all of the foregoing reasons, the judgment of the Court below, should be affirmed.

Respectfully submitted

Charles H. Keating, Jr.
Amicus Curiae

APPENDIX A

TIME-MOTION STUDY* OF FILM "UN CHANT D'AMOUR"

A-1 thru A-15

Landau v. Fording, 245 Cal. App.2d 820, 54 Cal. Rptr. 177, decided Oct. 24, 1966, wherein the Court of Appeal of California, First Appellate District, affirmed the trial court judgment that "Un Chant D'Amour" was obscene. Hearing denied in California Supreme Court on Dec. 21, 1966.

A-16 thru A-22

Landau v. Fording, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109, rehearing denied 389 U.S. 889, 19 L.Ed.2d 199, 88 S.Ct. 16 (June 12, 1967) wherein the United States Supreme Court granted a writ of certiorari and affirmed (5-4) the judgment of the Court of Appeal of California that "Un Chant D'Amour" was obscene.

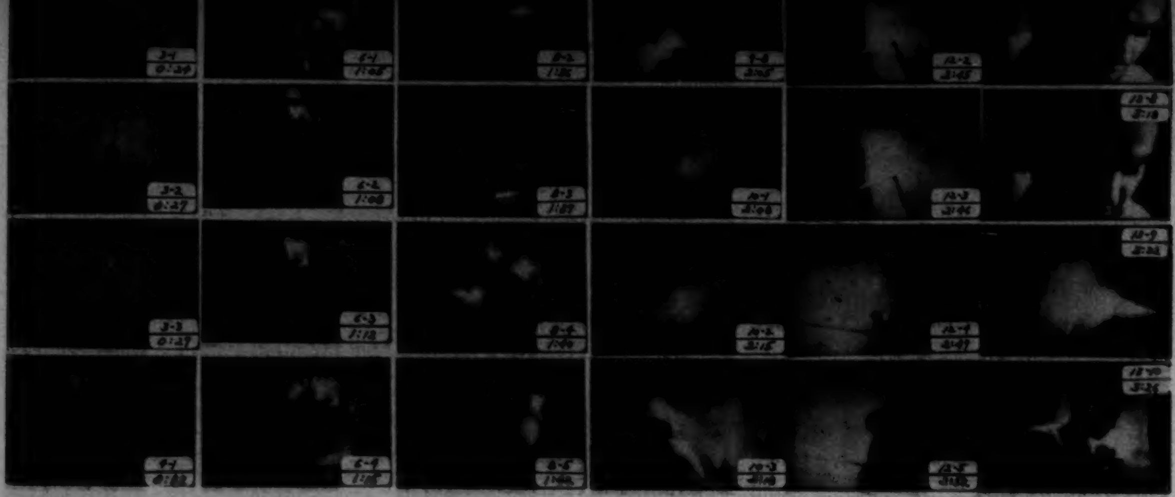
A-23

---

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

"UN CHANT D'AMOUR"
(Part 1 of 7 Parts)

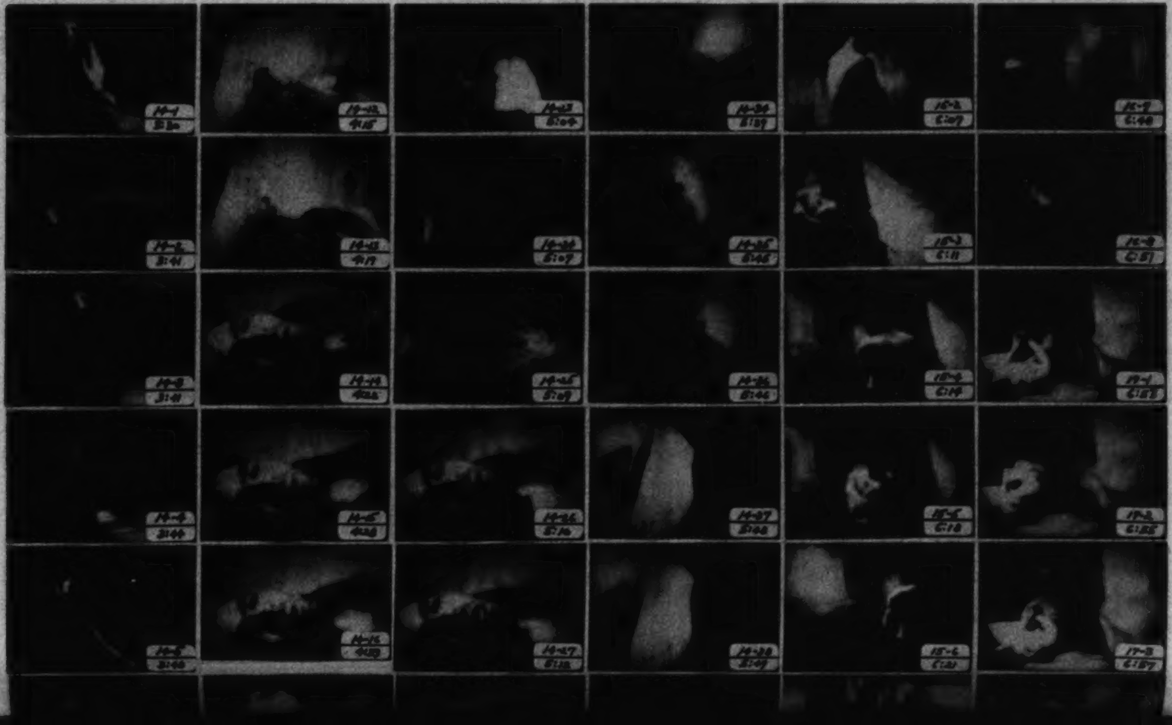
245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.


3-1
3-2
0:27
3-3
0:29
4-1
6-1
1:05
6-2
1:08
6-3
1:12
6-4
8-2
8-3
8-4
8-5
9-8
2:05
10-1
10-2
2:15
10-3
12-2
2:45
12-3
12-4
12-5
13-8
13-9
13-10

Credits 1-1 thru 1-2; guard walks outside prison 2-1 thru 2-5; prisoner's hand in cell window attempts to pass garland to inmate in adjoining cell 3-1 thru 3-3; guard outside prison 4-1; Prisoner 1 paces in his cell 5-1 thru 5-7; Prisoner 2 in adjoining cell listens and knocks on wall 6-1 thru 6-7; Prisoner 1 continues to pace 7-1 thru 7-3; Prisoner 2 knocks on cell wall 8-1 thru 8-5; Prisoner 1 listens and places right hand on tattoed girl on his left shoulder 9-1 thru 9-8; closeup of Prisoner 2's face 10-1 thru 10-4; Prisoner 1 paces in cell with hand on tattoo 11-1 thru 11-5; Prisoner 2 places straw through hole in the wall and blows smoke into adjoining cell cell 12-1 thru 12-6; closeup of Prisoner 1 with hand on tattoed girl 13-1 thru 13-10.

"UN CHANT D'AMOUR"
(Part 2 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.



Prisoner 2 smokes in his cell 14-1 thru 14-10; places chewing gum over hole in wall 14-11 thru 14-13; lies down on cot 14-14 thru 14-16; places hand in area of genitals 14-17 thru 14-25; closeup of Prisoner 2's face 14-26 thru 14-28; closeup of hand in area of genitals 14-9 thru 14-33; Prisoner 2 stands next to common wall 14-34 thru 14-38; with erect penis against it 14-39; and beats on wall with his fists 14-40 thru 14-43; Prisoner 1 dances with hand on tattoo 15-1 thru 15-6; guard walks in corridor outside cell and looks into cell 16-1 thru 16-8; prisoner lying on cot 17-1 thru 17-3; guard walks to another cell and looks in 18-1 thru 18-3; nude Prisoner 3 inside is masturbating 19-1 thru 19-3.

"UN CHANT D'AMOUR"
(Part 3 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

Nude Prisoner 3 masturbates 19-4 thru 19-6; guard watches 20-1; Prisoner 3 exposes himself to guard 21-1; guard walks to another cell 22-1 thru 22-2; negro Prisoner 4 is dancing and masturbating 22-1 thru 23-7; guard watches 24-1; negro Prisoner 4 continues to dance 25-1 thru 25-14; throws himself on bed and continues autoeroticism 25-15 thru 25-20; guard walks to cell of Prisoner 1 and looks in 26-1 thru 26-7; prisoner lies on bed manicuring toes 27-1; guard watches 28-1; closeup of Prisoner 1's feet 29-1 thru 29-4; guard watches 30-1; Prisoner 1 puts lefthand in area of genitals 31-1 thru 31-4; closeup of Prisoner 2 and Prisoner 1 31-3 thru 31-4, and 31-5 thru 31-6; closeup of Prisoner 2's face in apparent orgasm 31-7 thru 31-9; guard watches 32-1; Prisoner 2 removes hand from genital area and brings it to his face.

"UN CHANT D'AMOUR"
(Part 4 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

Prisoner 2 on bed 33-8 thru 33-14, hears noise and looks to wall 33-16 thru 33-18; guard walks to adjacent cell and looks in 34-1 thru 34-3; closeup of Prisoner 2 with face against wall 35-1 thru 35-2; closeup of Prisoner 1's face 36-1 thru 36-2; Prisoner 2 kisses wall 37-1 thru 37-2; Prisoner 1 takes straw and places it through hole in wall 38-1 thru 38-5; Prisoner 2 lights cigarette and blows smoke thru straw 39-1 thru 39-8; Prisoner 1 inhales smoke 40-1 thru 40-6; passing of smoke activity continues 41-1 thru 46-1; guard walks back to cell of Prisoner 1 and looks in 47-1 thru 47-3; closeup of Prisoner 1's face 48-1 thru 48-2; guard watches 49-1; closeup of Prison-1 and 2 in their cells 50-1 thru 52-1.

"UN CHANT D'AMOUR"
(Part 5 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

Prisoner 1 observes guard watching and gestures defiance 52-2 thru 54-4; guard outside cell; closeup of hand attempting to grasp swinging garland 56-1 thru 56-8; fantasy scene beteeew two male prisoners 57-1 thru 58-2; closeup of guard's face showing anger 59-1 thru 59-5; guard enters cell of Prisoner 2 with gun drawn 59-6 thru 59-9 and takes off his belt 59-10 thru 59-14; guard and Prisoner 2 face each other 60-1 thru 63-2; guard beats Prisoner 2 with belt 63-3 thru 65-5; Prisoner 1 listens in adjoining cell 66-1 thru 66-3; Prisoner 2 laughs 67-1 thru 67-4.

held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

"UN CHANT D'AMOUR"
(Part 6 of 7 Parts)

Fantasy scene with Prisoner 2 chasing Prisoner 1 68-1 thru 68-29; closeup of guard in cell of Prisoner 2 69-1 thru 69-2; closeup of hand trying to reach swinging garland 70-1 thru 70-4; Prisoners 1 and 2 exchange smoke inhalations 71-1 thru 71-5 and kiss 71-5 thru 71-6; embrace of two male nudes 72-1 thru 72-4; hand reaches to genital area and is grasped by another hand 73-1 thru 73-4; closeup of guard in cell of Prisoner 2 74-1 thru 74-2; Prisoner 2 lies on cot 75-1 thru 75-5; guard watches 76-1 thru 76-2; return to fantasy scene, Prisoners 1 and 2 outdoors 77-1 thru 77-7.

"UN CHANT D'AMOUR"
(Part 7 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

Prisoner 2 catches Prisoner 1 and carries him on his shoulders and lays him on the ground 77-8 thru 77-18; Prisoner 2 unbuckles Prisoner 1's belt 77-20 thru 77-21; shift to guard and Prisoner 2 inside cell 78-1 thru 80-1; hand grasping for swinging garland 81-1 thru 81-3; fantasy scene of fellatio between Prisoners 1 and 2 82-1 thru 82-22; shift to guard inside Prisoner 2's cell 83-1; Prisoner 2 unbuckles belt of Prisoner 1 in fantasy scene 84-1; inside Prisoner 2's cell guard places barrel of gun in Prisoner 2's mouth 85-1 thru 85-7; orgasm of guard 85-8 thru 85-9; hand tries to reach swinging garland at cell window 87-1 thru 87-2; Prisoner 2 knocks on cell wall to Prisoner 1 88-1 thru 88-3; guard walks outside prison 89-1; prisoner's hand in cell trying to reach garland being passed from adjacent cell window 90-1 thru 90-3. The End 91-1.

Saul LANDAU, Plaintiff and Appellant,

v.

Addison FORDING, Chief of Police, Berkeley, California, Earl Bergfeld, Director, Special Investigations Bureau of the Police Department of Berkeley, California, the Police Department of the City of Berkeley, California, and the City of Berkeley, California, Defendants and Respondents.

Civ. 22930.

District Court of Appeal, First District,
Division 2, California.

Oct. 24, 1966.
Hearing Denied Dec. 21, 1966.

Action to determine whether film was obscene. The Superior Court, Alameda County, George W. Phillips, Jr., J., entered judgment based on finding that film was obscene and an appeal was taken. The District Court of Appeal, Taylor, J., held that film "Un Chant d'Amour" was obscene within Penal Code definition and excluded from constitutional guarantees of freedom of speech and press.

Affirmed.

1. Constitutional Law ⇐90

While motion pictures, like other forms of expression are within ambit of constitutional guarantees of freedom of speech and of press, obscenity is not subject to those guarantees.

2. Evidence ⇐508, 516, 571(1)

Expert testimony was admissible to assist in trial court's determination of contemporary community standards as well as artistic merit and social importance of allegedly obscene film, and trial court was not required to base its conclusion solely on viewing of film. West's Ann.Pen.Code, § 311(a).

3. Constitutional Law ⇐90

Constitutional guarantees of free speech and free press are not confined to expression of ideas that are conventional or shared by majority.

4. Constitutional Law ⇐90

Constitutional protection afforded does not mean that visual impact of motion picture as distinguished from other media can be disregarded; films are obviously different from other forms of expression.

5. Constitutional Law ⇐90

Because of nature of medium, motion picture of sexual scenes may transend bounds of constitutional guarantee long before frank description of same scenes in written word.

6. Constitutional Law ⇐90

That allegedly obscene film was written and directed by a writer of renown did not settle question of whether film contained sufficient artistic merit to be within constitutional protection.

7. Constitutional Law ⇐90
Obscenity ⇐5

Film "Un Chant d'Amour" was obscene within Penal Code definition and excluded from constitutional guarantees of freedom of speech and press. West's Ann.Pen.Code, § 311(a).

◆

Johnston & Platt, Neil F. Horton, Oakland, Albert M. Bendich, Berkeley, Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California, San Francisco, for appellant.

Robert T. Anderson, Robert P. Berkman, Berkeley, for respondents.

TAYLOR, Justice.

The only question presented on this appeal is whether the trial court properly found that "Un Chant d'Amour," a film written and directed by Jean Genet, was obscene within the meaning of section 311, subdivision (a), of the Penal Code and, therefore, excluded from the constitutional guarantees of freedom of speech and of the press.

The pertinent facts are not in dispute. Appellant, Saul Landau, was authorized by the New York distributor to exhibit the film in the San Francisco Bay Area. Appellant shared the proceeds derived from such exhibitions with the San Francisco Mime Troupe, an unincorporated association. Under his agreement with the New York distributor, appellant was not entitled to exhibit the film at commercial movie houses catering to a general movie audience.

Prior to the instant proceeding, appellant had exhibited the film in Santa Barbara (before an audience comprised mainly of people from the Center for the Study of Democratic Institutions), in San Francisco at several private showings, at San Francisco State College, in several art movie houses in San Francisco, and in Berkeley at Stiles Hall, the University Y.M.C.A. After appellant sought to show the film a second time in Berkeley, his agent was advised by respondent Bergfeld, the Director of the Special Investigations Bureau of the Police Department, that the next time the film was exhibited in Berkeley, it would be confiscated and all persons responsible arrested. In so advising the agent of appellant, respondent Bergfeld acted as the agent of the Berkeley Police Department headed by respondent Fording.

Thereafter, appellant instituted this action for declaratory relief. At the trial of the action, the trial court, in order to determine the artistic value and social importance of the film, admitted the testimony of seven expert witnesses called by appellant[1] as well as its own expert witness[2] over the repeated objections of respondents who chose not to present any evidence, but argued that the court had to base its conclusions on the film alone. All of appellant's witnesses had different views as to the theme of the film, and while contending that it was not hard-core pornography, they agreed that the film should not be shown over television or in commercial motion picture theatres.

The trial court twice viewed the film and found that to the average person applying contemporary community standards, the predominant appeal of the film as a whole was to prurient interests, i. e., a shameful and morbid interest in nudity and sex, substantially beyond customary limits of candor in the description or representation of such matters. The court further found that the film explicitly and vividly revealed acts of masturbation, oral copulation, the infamous crime against nature (sodomy), voyeurism, nudity, sadism, masochism and sex and that it was "nothing more than cheap pornography calculated to promote homosexuality, perversion, and morbid sex practices," that it fell "far short of dealing with homosexuality, perversion, masturbation or sex from the scientific, historical or critical point of view," was completely lacking in the exposition of any ideas of social importance, and had no value as art or otherwise to give it redeeming social importance and thus obtain the benefit of the constitutional guarantees.

Accordingly, the court concluded that: the film was obscene within the meaning of section 311, subdivision (a), of the Penal Code; therefore, any exhibition or showing thereof would be in violation of section 311.2 of the Penal Code, and any person showing the film would not be able to claim as a defense that the exhibition was in aid of legitimate scientific or educational purposes within the meaning of section 311.8 of the Penal Code. This appeal is from the judgment entered in favor of respondents.

---

[1] The witnesses for appellant were: James Kerans, lecturer on dramatic literature and theory of the University of California, Berkeley; Irving Saraf, director of film programming for television station KQED; Mark Linenthal, assistant director of the Poetry Center of San Francisco State College; Jackson Burgess, novelist, film critic and professor of English at the University of California, Berkeley; Susan Sontag, novelist and film critic; Jan Marinissen, rehabilitation secretary of the American Friends Service Committee; Dr. Bernard L. Diamond, professor of Criminology and Law at the University of California, Berkeley.

[2] The court called as its own expert witness Dr. Charles W. Merrifield, professor of Social Science and the head of the Social and Behavorial Sciences at California State College, Hayward.

[1] While motion pictures, like other forms of expression, are within the ambit of the constitutional guarantees of freedom of speech and of the press (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098), obscenity is not subject to those guarantees (Roth v. United States, (Alberts v. State of California), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498).

Section 311, subdivision (a), of the Penal Code provides: "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

The statute was the codification of the definition of obscenity announced by the U. S. Supreme Court in Roth v. United States, supra (Zeitlin v. Arnebergh, 59 Cal. 2d 901, 918–919, 31 Cal.Rptr. 800, 383 P.2d 152). The section, in substance, prohibits "hard-core" pornography (Zeitlin v. Arnebergh, supra, at p. 919, 31 Cal.Rptr. 800, 383 P.2d 152). The U. S. Supreme Court has not yet determined whether Roth and the subsequent cases are limited to "hard-core" pornography.[3] (Manual Enterprises v. Day, 370 U.S. 478, 489, 82 S.Ct. 1432). In its most recent opinion dealing with a film, the U. S. Supreme Court said: "We would reiterate, however, our recognition in Roth that obscenity is excluded from the constitutional protection only because it is utterly without redeeming social importance,' and that 'the portrayal of sex, e. g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' Id. 354 U.S., at 484, 487, 72 S.Ct. at 1310. It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed. 2d 1512, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." (Jacobellis v. State of Ohio, 378 U.S. 184, at p. 191, 84 S.Ct. at p. 1680.)

The Jacobellis opinion also indicated that the applicable contemporary community standard is not that of the local community where the case arises, but a national standard (supra, pp. 192–195, 84 S.Ct. 1676). The most recent decisions of the U. S. Supreme Court affirm the requirement that the elements of obscenity defined in Roth must coalesce, that there will be no balancing of "social importance" against the other elements (Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 419, 86 S.Ct. 975), and announced a new doctrine, namely, that evidence that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance (Ginzburg v. United States, 383 U.S. 463, 470–473, 86 S.Ct. 969, 16 L.Ed.2d 31; Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56), Ginzburg and Mishkin indicating that apart from the nature of the

---

Significantly, only in a few cases, notably Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639; Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, and Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1, was the court ever required to apply its standards to the materials in question. In all of the other cases, because the issue before the court was the constitutionality of a particular statute, the issue of the obscenity of the material itself was either assumed or not discussed.

material, the conduct of the disseminator and the commercial context in which the dissemination occurs are significant.

[2] We first dispose of respondents' contention that the trial court erred in admitting the testimony of the expert witnesses and in failing to base it conclusions solely on the viewing of the film. The question here presented is not one of fact alone but is mixed with a determination of law (Zeitlin v. Arnebergh, 59 Cal.2d 901 at p. 910, 31 Cal.Rptr. 800, 383 P.2d 152). The court must make an independent judgment as to whether the *material involved is constitutionally protected* (Jacobellis v. State of Ohio, supra, 378 U.S. p. 190, 84 S.Ct. p. 1679). In almost every field of the law, expert testimony is permitted on subjects concerning which the judge or administrator has no specialized competence. So here, the lower court properly received evidence to assist in the determination of contemporary community standards as well as the artistic merit and social importance of the film (Smith v. People of State of California, 361 U.S. 147 at pp. 157, 166–167, 80 S.Ct. 215, 4 L.Ed.2d 205).

The principal question is whether "Un Chant d'Amour" satisfies the test of obscenity established by our statute and the decisions of the U. S. Supreme Court. Before exploring the "dim and uncertain" line that often separates obscenity from a constitutionally protected expression (Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584), we give a description of the film which was viewed in its entirety by the justices of this court.

"Un Chant d'Amour" is an 8 mm. silent film of about 30 minutes' duration made in the style of the short silent films of the 1920's and apparently deliberately ambiguous. No music or text accompanies the film. The actors are professionals. The picture was made with artificial lighting on autochromatic film which is blind to red so that almost all of the grays are eliminated. The resultant strong contrasts between dark and light create a particularly visual impact.

The setting is an unnamed prison cell block in an unnamed place. The principal characters are a guard and four prisoners. At the outset, the guard is walking outside the prison walls. Each prisoner is alone in his cell engaging in various acts of self-love and masturbation. The prisoners are also shown communicating with each other by knocking on the walls and by the passage of a straw through a hole in the thick wall between the cells, and the blowing of smoke through a straw. Two of the prisoners are clearly involved in a homosexual relationship. The guard in the course of his duties looks into each of the individual cells through peep holes and observes the prisoners. Their acts of sexual perversion and particularly the conduct of one hairy-chested prisoner arouses the guard's voyeuristic and latent homosexual tendencies. The film reaches a climatic ending in a sadistic beating of the hairy-chested prisoner by the algolagnic guard. In the last scene, the guard is again walking outside the prison wall.

In the last half of the film, the realistic scenes in the prison are interspersed with three series of brief recurring fantasy scenes that may or may not be the fantasy of some or only one of the characters. In the first series, two hands emerge from their individual barred cell windows and one hand attempts unsuccessfully to throw a garland of flowers to the other. Toward the end of the film, the garland is caught. In the second series of fantasy scenes (most likely those of one or both of the prisoners who are homosexually involved with each other), the prisoners are playing together in a romantic sunlit wood. During the third series (most likely those of the guard during the beating), two male heads are seen passionately kissing; two male torsos appear in various positions depicting fellatio, sodomy and oral copulation. The fantasy scenes increase in intensity during the film. At several points, the fantasy and the reality appear to merge; for example, in one scene, a prisoner puts on his jacket; he is next seen wearing the jacket in the sentimental woods fantasy. The portrayals of sexual perversion occupy in excess of half of the footage of the film.

It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. Thus, the instant film is clearly distinguishable from Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639,[4] and similar cases such as Times Film Corp. v. City of Chicago, 355 U.S. 35, 78 S.Ct. 115, 2 L.Ed. 2d 72, and One, Inc. v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352.[5]

[3] At the outset, we wish to make it patently clear that our conclusion is not based on the particular relationships depicted in "Un Chant d'Amour." We recognize that the constitutional guarantee is not confined to the expression of ideas that are conventional or shared by a majority (Kingsley Pictures Corp. v. Regents, 360 U.S. 684 at pp. 689, 705, 79 S.Ct. 1362, 3 L.Ed.2d 1512). We think there is no question that there could be an effective and dramatic film about homosexuality and sadism in prisons unaccompanied by any obscene matters (Kingsley, supra) or that a film unquestionably obscene under the applicable standard may not be so when limited to an audience of specialists (cf. United States v. 31 Photographs, Etc. (S.D.N.Y. 1957) 156 F.Supp. 350).

But from the fact that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (Burstyn, supra, 343 U.S. at pp. 502–503, 72 S.Ct. at p. 781).

[4] Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (Freedman v. State of Maryland, 380 U.S. 51, at p. 61, 85 S.Ct. 734, 13 L.Ed. 649). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707–708, and 42 Cal.L.Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., supra, at p. 708).

[5] Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word. We cannot here disregard the potent visual impact of the movie in depicting acts of male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy without any clear reference or relation to a dominant theme. We conclude that measured in terms of the sexual interests of *its intended and probable recipient group* (Mishkin v. New York, 383

---

[4] Wherein the court held that offensive material admittedly intended to appeal to homosexuals was not obscene because the representation and descriptions did not go "substantially beyond customary limits of candor" (at p. 486, 82 S.Ct. at p. 1436).

[5] Both of these were per curiam reversals after Roth. The nature of the materials is described by brief quotations from the lower court opinions in Zeitlin v. Arnebergh, supra, footnote 22, 59 Cal. 2d at page 915, 31 Cal.Rptr. 800, 383 P. 2d 161.

U.S. 502, 509–510, 86 S.Ct. 958, 16 L.Ed.2d 56) or to the average person, applying contemporary standards, the predominant appeal of the film taken as a whole is to the prurient interest.[6]

We turn next, therefore, to the more difficult and delicate question of whether there is present in the film any matter of social importance (including artistic merit) that would, as appellant argues, recover for the film its protection as a constitutionally protected utterance (Zeitlin v. Arnebergh, supra, 59 Cal.2d at p. 920, 31 Cal.Rptr. 800, 383 P.2d 152).

[6] The fact that the writer, director and producer of the film, Jean Genet, is a French writer of renown does not, as appellant argues, settle the crucial question of whether the film contains sufficient artistic merit. Great artists can create the type of "hard-core" pornography proscribed by our statute. Often, as in Zeitlin v. Arnebergh, supra, the technical excellence and artistic merit redeem the work despite its obscene content. Unfortunately, that is not the case here. Even appellant's own literary witness admitted that the film was made at the beginning of Genet's career as a playwright and is a transitional work in his development from a novelist into a dramatist. The witness also testified that "Un Chant d'Amour" is much less complicated than his later works and is not easily recognizable as a work of Genet. The artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture into the fields covered by the film. As we indicated above, the technical aspects of the motion picture medium simply increase the burden on the artist and add a different and far more sensitive dimension.

The fact that there is no text or dialogue accompanying the film contributes to its ambiguity and the absence of a dominant theme. We think it a significant indication of the film's failure that none of the witnesses produced could agree on its dominant theme.[7] We note that in Jacobellis, supra, in holding that the film "The Lovers" was not obscene, the court had no problem of ascertaining the theme or plot of the film. The same clear indication of a particular story line along with the artistic necessity of the objectionable scenes was present in the decisions upholding the film "Lady Chatterley's Lover" (Kingsley, supra) and "Anatomy of a Murder" (Columbia Pictures Corporation v. City of Chicago (N.D. Ill.1959) 184 F.Supp. 817). A plot and some attempt at character development was apparently also clearly discernible in Times Film Corporation v. City of Chicago, supra, and One, Inc. v. Olesen, supra).

Here the erotic scenes recur with increasing intensity and without direction toward any well-defined, wholesome idea, through scene after scene. The various sexual acts are graphically pictured or emphatically suggested with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus by the very fact of omission emphasized. If the film was intended as an artistic portrayal, it clearly failed in its endeavor. The fantasy portions of the film portray purely physical acts of increasing intensity without any contribution to character or plot development.[8] Significantly, it was the very absence of such treatment of sex that led our Supreme Court to conclude that "Tropic of Cancer" was not the hard-core pornography proscribed by section 311, subdivision (a) of the Penal Code (Zeitlin v. Arnebergh, supra, 59 Cal.2d p. 922, 31 Cal.Rptr. p. 813, 383 P.2d p. 165.) In our opinion, the production does nothing more than depict a number of disjointed scenes treating sex in a shocking, morbid and shameful manner and is devoid of artistic merit.

---

[6] We note that appellant concedes that the U. S. Court's rejection of an "average man" prurient appeal test in Mishkin undercuts a substantial portion of his argument.

[7] Some suggested the effect of isolation and imprisonment upon both prisoners and guards; another, an attempt at penal improvement; others, a comment on the isolated human condition and the difficulties of human contact.

[8] The presentation of most of the erotic material in the fantasy scenes is significant. As one eminent authority, the noted anthropologist, Margaret Mead, stated: "We may define pornography, cross-culturally, as words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being. *The character of the daydream as distinct from reality is an essential element in pornography.* True, the adolescent

However, as Kingsley pointed out, the constitutional guarantee does not extend only to materials artistically expressed. We are left, therefore, with the question of whether the film contains any other concepts of redeeming social importance. As indicated, the fact that the film is silent and there is no text or explanation to accompany it, contributes to its ambiguity. Precisely because of this ambiguity and lack of ascertainable dominant theme, the film is clearly not a documentary of prison life or a scientific study of prison psychology. While some of appellant's witnesses indicated that the film might reflect on the need for prison reform, all agreed that it should not be shown on television or in a commercial motion picture theatre except possibly with other documentaries.[9] Dr. Diamond stated: "Like anything else, if it were handled indiscriminately, carelessly, for commercial purposes, I think it might be very bad. Q. So it would lose its effectiveness in your opinion if it were shown indiscriminately? A. I don't think it would lose its effectiveness for certain groups of people, but the effect on other groups might outweigh its effectiveness and is not the only device available for prison reform." Dr. Merrifield also agreed that the film could be harmful.

[7] The record indicates that the film, although shown to an audience somewhat more limited than the general motion picture audience, was commercially exploited and appellant earned substantial amounts from its exhibitions in the Bay Area. Applying the criteria recently set forth in Ginzburg v. United States, supra, we are, therefore, further propelled toward the conclusion that it is utterly without redeeming social importance and that it meets all of the requirements set forth in section 311, subdivision (a), of the Penal Code. As Mr. Justice Stewart noted in Jacobellis v. State of Ohio, supra, 378 U.S. at page 197, 84 S.Ct. at page 1683, hard-core pornography is hard to define but he "knew it when I see it." We think we have seen it in "Un Chant d'Amour." It is nothing more than hard-core pornography and should be banned.

The judgment is affirmed.

SHOEMAKER, P. J., and AGEE, J., concur.

Hearing denied; PETERS, TOBRINER, and MOSK, JJ., dissenting.

---

may take a description of a real event and turn it into a daydream, the vendor of pornography may represent a medical book as full of daydream material, but the material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of nonparticipation—of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners, or because the recipient of the pornography has lost the precious power of spontaneous sexual feeling." (Mead, Sex and Censorship in Contemporary Society, New World Writing, Third Mentor Selection 18 (1953) quoted in Lockhart and McClure, The Law of Obscenity and the Constitution, 38 Minnesota Law Review, 295, fn. 182 at pp. 321-322; emphasis supplied.)

[9] As the Federal Government has occupied the field of radio and television to the exclusion of the states (Allen B. Dumont Laboratories v. Carroll (3d Cir. 1950) 184 F.2d 153), this testimony is not pertinent except as an indication that the film was suitable only for a limited audience.

SAUL LANDAU, Petitioner,

v

ADDISON FORDING, Chief of Police, Berkeley,
California, et al.

388 US 456, 18 L ed 2d 1317, 87 S Ct 2109, reh den
389 US 889, 19 L ed 2d 199, 88 S Ct 16

[No. 1164]

June 12, 1967

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District.

Same case below, 245 Cal App 2d 820, 54 Cal Rptr 177.

Marshall W. Krause for petitioner.

Robert T. Anderson and **Robert P. Berkman** for respondents.

Per Curiam.
The petition for a writ of certiorari is granted and the judgment of the Court of Appeal of California, First Appellate District, is affirmed.

Mr. Justice **Black**, Mr. Justice **Douglas**, Mr. Justice **Stewart**, and Mr. Justice **Fortas** would grant the petition and reverse.

WHITEHOUSE TRUCKING, Inc., Appellant,

v

UNITED STATES et al.

388 US 453, 18 L ed 2d 1317, 87 S Ct 2111

[No. 1255]

June 12, 1967

Appeal from the United States District Court for the Northern District of Ohio.

Same case below, 261 F Supp 9.

Robert P. Mone and **James M. Burtch** for appellant.

Solicitor General **Thurgood Marshall**, Assistant Attorney General **Turner**, **Howard E. Shapiro**, **Robert W. Ginnane** and **Nahum Litt** for the United States et al., and **James E. Wilson** and **Edward G. Villalon** for Hennis Freight Lines, Inc., et al., appellees.

Per Curiam.
The motions to affirm are granted and the judgment is affirmed.

Appendix B.

State Statutory Standards
Dealing With
Offenses Against Morality and Decency.

ARRANGED BY STATE AND TOPIC

B-2

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PR
					ALABAMA					
Title 14 Chapter 64 14-372 et seq. Scienter, Presump. 14-374 (15)	7-1091	Exposure: 14-326 (1) Enticing child for immoral purpose 14-326 (3)	Nude Pictures 14-374	Equity Action 14-374 (5) Obscenity: Injunc. 14-374 (7) Nuisance: "lewdness, assignation or prostitution" 7-1091	Before Women 14-11	14-16	14-16	14-108	14-325 et seq.	14- et Nu 7-

Obscene defined:
"...Lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its domina
theme taken as a whole appeals to prurient interest." 14-374 (3)

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PR
					ALASKA					
Comic Books 11.40.170	toward children 11.15.134	Exposure: 11.40.080 Contrib. to delinq. of child 11.40.130 Delinq: "immoral.... obscene,.... vulgar,.... indecent...." 11.40.150 Indecent comic book 11.40.170			telephone: 11.45.035	11.40.010 et seq.	11.40.040	11.40.120	11.40.110	11. et 11.

Defin:
"Sexually indecent...adultery, homosex., sadism, masochism, perversions, lewd, lascivious, suggestive, amorous embraces, scan
breasts or genitals exposed" 11.40.170 (4)

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PR
					ARIZONA					
13-531 et seq. Minors 13-536 Near School 13-601.01	13-651 et seq. 13-492 13-991 et seq.	(see obscenity)	Motion picture depicting nudity (minors) 13-536	Nuisance: "indecent or offensive to senses" 13-601 Obscenity: Injunction 13-535	Language 13-377 Obscene song: 13-378 telephone 13-895	13-221 et seq. Incestuous Adultery 13-471	open and notorious 13-222	13-651 13-652	13-471 25-101	13 m N 13 12 p

Obscene defined:
"that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interes
nudity, sex or lewdness going substantially beyond customary limits of candor in description or representation of such matters and is
without redeeming social importance." 13-531.01

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PR
					ARKANSAS					
41-2729 et seq. 41-2701 et seq. Defin: "obscene, vulgar, indecent" 41-2704 "matter of grave concern to the people" 41-2714 Scienter presump. 41-2727 Sale to minors 41-2762	(see obscenity)	Exposure: 41-2701 Indecency: 41-2703 Before children 41-1127	Nudism: 47-2709 et seq. "public exhibition of nudity" 41-2701 "private parts exposed in presence of others" 41-2709	Injunc. 41-2721 41-2718 Action in Chancery Court: 41-2717 Nuisance, nudist camp 34-101 et seq.	41-1401	Divorce grounds 34-1202	Charge of, is slander 41-2407	41-813 41-814	41-811 53-103 et seq.	4 e N 4

Obscene defined: "To the average person, applying contemporary community standards, the dominant theme of the material taken as a whole
prurient interest." 41-2715 (2)

B-3

CALIFORNIA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
Penal Code 311 et seq. Local regula. of exposure of genitals, buttocks or breasts (eating place) PC 318.5	PC 314, 650 1/2 PC 11225 et seq. Registra. of offenders PC 290	Obscene live conduct PC 311.6 Acts outraging decency PC 650 1/2 Indecent Exposure PC 314 Indec. Exhibit., children participating Lab 1308	Topless waitresses and entertainers Penal Code See obscen. defin. PC 311 (a)	Nuisance: "lewdness, assignation or prostitution..." PC 11225 Nuisance: "indecent or offensive to the senses." CC 3479 Public nuisance: "indecent" CCP 731	Vulgar, profane or indecent PC 415 song 311.6	PC 269a 269b	Cohabitation PC 269a 269b	PC 286 288 A	PC 285	Penal Code 647 Nuisance PC 11225

Obscene defined:
"taken as a whole, the predominate appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." PC 311 (a)

COLORADO

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
40-9-16 et seq. Mandamus against D.A. 40-9-21	40-9-15 (see indecency)	Indecent liberties 40-2-32 Lewd display or notorious act of public indecency 40-9-15		Nuisance: "lewdness, assignation, or prostitution" 39-15-2 Injunction: 40-9-22 40-7-105		40-9-1 et seq. 40-6-501	40-9-3 40-9-15	Loss of civil rights 39-10-18	40-9-4 et seq. Disqual. for civil rights 39-10-18	40-9-15

Obscene defined:
"obscene...lewd, or indecent, or lascivious...or other representation...of an immoral or indecent nature...pictures of men or women in indecent attitudes or positions....,indecent or immoral details of crime, vice, or immorality, to corrupt public morals, or to offend common decency...or to make ...immorality and licentiousness attractive..." 40-9-17

CONNECTICUT

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
53a-193 et seq. Minors 53a-196 Indecent [illegible] 53a-197	53-185 et seq.	53a-82 et seq.	Nudity defined: 53a-193 (2) See obscen. defin. 53a-193	Nuisance: "lewdness, assignation, or prostitution" 19-316 Obscenity: Injunction 53a-199 53a-200	(repealed)	53a-81	(repealed)	Penal Code 76 et seq.	53a-191	Penal Code 83 et seq.

Obscene defined:
"...(1) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, (2) it goes substantially beyond customary limits of candor in describing or representing such matters, and (3) it is utterly without redeeming social value." 53a-193

DELAWARE

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
11-711 et seq. Minors 11-418 et seq.	Defined 11-731		Nudity defined: 11-438a (e)	"social vices" Nuisance: 10-7101 et seq. Nuisance: "lewdness, assignation, or prostitution" 10-7107 Obscenity: Restraining order in Chancery 11-438 g		11-575 11-591 11-821 Curtesy of Hus. barred by, 25-744	11-591 11-821 822		11-591 24-1790	11-731 et seq. 16-703

Obscene defined:
"...obscene, lewd, lascivious, filthy, indecent...or instrument of indecent or immoral use or purpose..." 11-711

B-4

DISTRICT OF COLUMBIA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
22-2001 et seq. 47-2301	22-2713 Lewd, indecent or obscene acts 22-111.2 Nuisance 22-2713	22-1112	(not researched)	Nuisance "lewdness, assignation, or prostitution 22-2713		22-301			22-1901

Obscene defined:

FLORIDA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
847.011 et seq. Nuisance: 823.05 Minors: 847.012 Scienter Presumptions 847.011 (3) (b)	Defined: 798.02 847.011 Children and minors 847.012 .013 License revocation, barbers 476.14	Exposure: 800.02 .03	Nudity defined: 847.013 (b)	Obscenity: Injunction: 847.011 (8) (a) Nuisance: "injurious to the morals, prostitution, assignation, lewdness, games of chance..." 823.05 Obscenity: Injunction: 847.013 (3) (a) Pre-emption of legislature 847.013	847.05 Pupil using: 232.26 Open profanity 847.04 Indecent language 365.16	798.01 798.04	798.03 .04 Female children and idiots 794.05 .06	800.01 .02	741.22

Obscene defined:
"...obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic..." 847.011 (1) (a)

GEORGIA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
26-2101 et seq. Minors 26-9901a Pandering as separate test: 26-2101 (c)	26-2011	Public Indecency 26-2011 Indec. Ex. children disposed of for 24-9914 99[illegible] Disbarment of attorney for 9-501 Enticing child for indec. purposes 26-2020	Nudity or sexual conduct, material depicting 26-2102 See obscene definition 26-2101 (b)	Nuisance: "...tends greatly to corrupt the manners and ... morals of ... the people." 72-201 Crime is indictable as a nuisance 72-9901	26-2613 May justify assault 26-1306	26-2009	26-2010	26-5901 et seq.	26-2006

Obscene defined:
"...if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful
interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyon
limits of candor in describing or representing such matters." 26-2101 (b)

HAWAII

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
727-8 et seq. Public shows 145-165 Obscene literature 727-8	768-[illegible] 727-1 et seq. Lascivious conduct 768-5[illegible]	(see obscene def)		Nuisance: obscene exhibitions "...obscene, lewd, lascivious, filthy, indecent, or disgusting... ...tends to the corruption of the morals..." 727-8	759-1 -2	768-11 et seq.	768-15 et seq.	768-61 et seq.	768-41

Obscene defined:
"...obscene, lewd, lascivious, filthy, indecent, or disgusting, or the chief features of which consist of pictures or stories of
or which manifestly tends to the corruption of the morals of youth, or of morals generally..." 727-8

IDAHO

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
Minors 18-1514 et seq. [illegible] 18-[illegible] Indictment 19-1413 Such materials contribute to crime and impair ethical development 18-2104	Open lewdness 18-2101	18-4101 "Indecent Nuisance" 52-111	Nudity defined: 18-2105 (2) Nudity (minors) 18-2106 (1) (a) "Nudity" See obscen. definition 18-2105 (6)	Moral Nuisance "injurious to morals... indecent..." 52-101 "injurious to public morals..." 52-103 Obscenity enjoined 18-1513 et seq. Injunction obscenity 18-2111 Nuisance: "Prostitution, lewdness, assignation or other indecent acts, or house of ill fame" 52-104		18-6601 31-603 32-604	Lewd cohabitation 18-6604	18-6605 6606	18-6602 32-205	18-2102 Nuisance 52-104

Harmful to minors defined:
"(6) The quality of any material or of any performance or of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (1) predominantly appeals to the prurient, shameful or morbid interest of minors, and (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social importance for minors. (b) The quality of any material or of any description or representation, in whatever form, which, as a whole, has the dominant effect of substantially arousing sexual desires in persons under the age of eighteen (18) years." 18-2105 (6)

ILLINOIS

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
38-11-20 Minors 38-11-21 et seq. Minors 38-22-1353 et seq. Prima facie evid. of intent 38-11-20 (e)	9-2701 et seq.	Lewd exposure: "Public indecency...includes...(1) sexual intercourse... (2) deviate sexual intercourse... (3) lewd exposure of the body...(4) lewd fondling of the body..." 38-11-9 Indec. liberties w/child 38-11-4 et seq.	Nudity (minors) 38-11-21 (b) (1) "Nudity" See obscen. defin. 38-11-20 (b)	Nuisance: "Lewdness, assignation, or prostitution" 100 1/2-1	telephone 134-16.4 16.5 Passengers 114-87.49	38-11-7	38-11-8	38-11-2	38-11-11 38-11-10	38-11-14 et seq. Nuisance 38-37-1 100 1/2-1

Obscene defined:
"...considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters..." 38-11-20 (b)

INDIANA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
10-[illegible] et seq. Minors 10-817 et seq. teaching in high schools 28-[illegible] Yellow back novels 11-23-91	Lewd matter 10-2803 Nuisance: 9-2701 immoral places 10-4210	Exposure: 10-2801 letting stallions in public 10-2802	Nudity defined: 10-817 (b) Nudity (minors) 10-819	Nuisance: "lewdness, assignation or prostitution" 9-2701 et seq.	In presence of female: 10-2801 telephone 10-4944	10-4207	10-4207 4208	10-4221	10-4206	10-4220 et seq. Nuisance 9-2701

Obscene defined:
"...obscene, lewd, indecent, or lascivious..., instrument or article of indecent or immoral use,..." 10-2803

IOWA

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTI- TION
725.3 et seq. Minors 725.8	725.1 et seq. Lewd act in presence of child; corrupting morals of children: 725.2, .3	Exposure 725.1		Nuisance: "...inde-cent..." 657.1	Profane and indecent 728.1	702.1	vicious... cohabita-tion 725.1	705.1, .2	704.1	724.1 et seq.

Obscene defined: "...obscene, indecent, immoral, or impure...which would tend to the corruption of the morals of youth or others..." 725.3 (dram, play, exhibition, show or entertainment) . "...obscene, lewd, indecent, lascivious, or filthy...or article of indecent or immoral use..." 725.5 (book, pamphlet, picture, writing or instrument).

KANSAS

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTI- TION
21-4301 Minors 21-4301 a	Lewd and lascivious behavior: "sexual intercourse... being viewed ...or the exposure of a sex organ..." 21-3508	Exposure: 21-3508	See obscen. definition 21-4301 (2) (a)	"Endangers ...public health" 21-4113	In films 51-112 (researched 1970) telephone 21-4113	21-3507	21-909 23-118 (repealed)	21-3505 aggravated sodomy 21-3506	21- 3602	21-3512 et seq.

Obscene defined: "...considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and the material is patently offensive and utterly without redeeming social value..." 21-4301 (2) (a)

KENTUCKY

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTI- TION
436.080 et seq. Minors 436.101 (3) et seq. and 436.540 et seq. Publica. featuring crime 436.110 See offenses against morality" Illicit sex in comic books 436.540 et seq.	436.075 Exhibiting studhorse, jack or bull 436.170	Exposure bathing park 436.140 Indecent practices 435.105 (researched 1970)	"Nudity" See ob-scenity definition 436.101 (c)	Injunction, obscene matter 436.570	86.170 telephone 436.107 swearing profane cursing 431.090 436.150 train 277.260 437.090	436.070	436.070	Sodomy buggery 436.050	436.080	436.075 Nuisance 233.0

Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 436.101 (c)

LOUISIANA

Civil (Roman) law State

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTI- TION
14.106 Minors 14:91.11 14: 92.2 Pre-emption of regula-tion 14:92.2	Disorderly conduct 14:103 Exhib. of minors 23:251	Contrib. to delinquency "place where sexually indecent and obscene mat-erial...is offered...or exhibited" 14:92 Indecent behavior 14:81 Public morals 14:281 et seq.	Nudity defined: 14:92.2 A (2)	Obscenity, Nuisance "assigna-tion, pro-stitution or obscenity" 13:4711	14:92 telephone 14:285 45:1166 Language or gestures 14:103		(indexed under other topics)	14:89	14:78	14:82 et seq.

Obscene defined:
"(1) Exposure of one's person in a public place...that sex organ may be seen...by another.... with the intent of arousing sexual desire. (2) Production (of matter)...with the intent to primarily appeal to the prurient interest...of any lewd, lascivious, filthy or sexually indecent (matter)...(4)...any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement..." 14:106 A

MAINE

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
17-[illegible] et seq. 17-3708 Minors 17-[illegible]	17-2051	17-901	Nudity defined: 8-660	Nuisance: "Places resorted to for lewdness" 17-2741	Indecent language profanity and offensive language 17-452	17-101	7-1551	17-1001	17-1501	17-3051

Obscene defined: "...illustrations of ...sadism, masochism, sexual perversion, bestiality or lust, or obscenity, indecency or immorality..." 17-2901

MARYLAND

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
27-417 et seq. Minors 27-419 et seq. Obscene movies [illegible]	Defined 27-16	Indecent exposure 27-122	Nudity proscribed and defined 27-416 A-G Nudity and sexual displays 27-418A	Injunction obscenity: circuit cts. and equity cts. 27-418 A	Profanely cursing in streets 27-121 Blasphemy 57-12 telephone 27-555A	for divorce 16-24	Abduction for fornica. 27-1	27-553 554	27-335 390 391	27-1 et seq. 27-125 428 429 431 575

Obscene defined: "...obscene..." 27-416 (held to give adequate warning of the conduct proscribed and to mark boundaries sufficiently distinct for judges and juries fairly to administer the law. Levin v. State, 1 Md. App. 139, 228 A. 2d 487 (1967).)

MASSACHUSETTS

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
Retail 272-28A et seq. wholesale 272-28B Minors 272-28 Scienter presumption [illegible] Obscene comics 272-30 Obscene literature Control Commission 6-[illegible]	Immoral Entertainments "lewd, obscene, indecent, immoral or impure show ...or tending to corrupt morals of youth..." 272-32 33 Unnatural and lascivious act 272-35 Lewd and lascivious persons 272-53	Indecent Exposure 272-53 Devices for indecent purposes 272-21	Nudity: See obscenity definition 272-28 (par. 2)	Obscenity, petition in equity 272-28C Nuisance "prostitution, assignation or lewdness" 139-4	Profane obscene impure language 272-31 Blasphemy 272-36 Obscene language at sporting event 272-36A Arrest for using 272-59 telephone 269-14A	272-14 et seq.	272-18 et seq.	272-34 Unnatural and lascivious acts 272-35 35A 277-45	272-17	272-53 et seq. Nuisance 139-4

Obscene defined: "...obscene, indecent or impure..." 272-28A

Obscene to minors defined: "...obscene, indecent or impure, harmful to minors, or manifestly tends to corrupt the morals of youth..." "...harmful to minors" (means) ...representation of nudity, sexual conduct or sexual excitement which appeals predominately to the prurient, shameful or morbid interest of minors under eighteen years of age, is patently contrary to prevailing standards of adults in the community as to suitable material for such minors, and is utterly without redeeming social importance for such minors." 272-28

MICHIGAN

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
Penal Code 28.575 et seq. 27A.2938 et seq. Minors 28.575 (5) Obscenity enjoined 27A.2938 Scienter presumption 28.575 (1)	Gross lewdness and lascivious behavior 28.567 Homosexuality 28.570	Exposure 28.567 (1) City power 5.1740 Gross indecency 28.570 (1) Exhibition of children 28.335	Nudist camps, taxation 7.555 (3a)	Village powers 5.1285 5.1332 Nuisances: 28.569	Indecent language in presence of women and children	28.218 219	Lewd and lascivious cohabitation 28.567	28.355 356	28.565	28.131 .345 (3) .409 .703 .717 .1285 .1865 Nuisance 27A.3801

"Lewdness, assignation, prostitution, gambling, prostitutes, disorderly persons, (illegal) narcotic drugs, (illegal) liquors..." 27A.3801
Obscenity Injunction: "...obscene, lewd, lascivious, filthy, indecent, or disgusting, or...instrument of indecent or immoral use..." 27A.2938

Obscene defined: 1. "...obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic..."; 2. Test to be applied: "...the effect of the (material)...considered as a whole...upon the average person in the community....judged...by the standards of common conscience of the community of the contemporary period of the violation charged;" 3. "...portrayal...of illicit sex, or sexual relations, of perversion, lust or sexual passion..." 1.28.575 (1); 2. 28.575 (2); 3. 28.575 (3)

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PRO TIO
					MINNESOTA					
617.241 et seq. Minors 617.293 Village power to restrain 412.221 Obscenity is harmful to minors; urgent need to prevent commercial exposure. 617.291 (Subdiv.1) Motion picture rating system, evid. 617.297	gross lewdness and lascivious behavior 617.23	Lewd exposure 617.23 Indecent articles 617.25 .251	Nudity defined 617.292 (3) Nudity (minors) 617.293 (a)	Obscenity: Village power to restrain and punish 412.221 Obscenity Public Nuisance 609.74	Language provocative of assault 615.15 telephone 614.75	617.15 (repealed)	617.16 (repealed)	609.293 Bestiality 609.294	617.13	617.3 et se (repe
Obscene defined: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a wh appeals to prurient interests." 617.241										
					MISSISSIPPI					
11-2674-01 et seq. Maximum promptness and dispatch 11-2674-08 Enjoined 11-2674-10 equity rules in procedure 11-2674-08 Scienter presumption 2674-15	Stallion or jack in public view 11-2292	"private parts" exposure 11-2290 Obscene indecent immoral exhibitions 11-2286		Nuisance "lewdness, assignation or prostitution" 11-1060 Obscenity enjoined 11-2674-10 Obscenity action in Chancery ct. 11-2674-04 rules of civil procedure pertaining to equity cases are applicable 11-2674-08	"Profanely swear or curse...use vulgar and indecent language..." 11-2291 telephone 11-2291.5	11-1998 et seq.	11-1998 et seq.	(not re-searched)	11-457 458	11-2 et se Nuis 11-1
Obscene defined: "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole a to prurient interest." 2674-02										
					MISSOURI					
563.270 et seq. Search and seizure 542.380 et seq. 563.286 Minors 563.310 Enjoined 563.285	542.430 563.150	Exposure to minors 563.160 Exposure 563.150		Obscenity enjoined 563.285	Vulgar obscene or indecent pleadings in newspaper 563.280	563.150		563.230	felony 563.220	563. et se Nuis "hav hous 563.
Obscene defined: 1. "...devoted mainly to...scandals, whorings, lechery, assignations, intrigues between men and women and immoral conduct o persons..." 563.270: 2. "...obscene, lewd, licentious, indecent or lascivious...or other publication of indecent, immoral or scand character...or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or evidence..." 563.280										
					MONTANA					
94-3601 et seq. seizure authorized 94-3604 94-3618	lewdness 94-1002	Indecent exposure: 94-3603 "private parts"		Nuisance: "indecent or offensive to senses" 57-101 93-6101 94-1001 et seq. 57-110 57-103 Nuisances: "lewdness, assignation, prostitution, gambling, (illegal) wine rooms, (illegal narcotics), or other illegal acts prohibited by title 94 chapters 24 and 30."	sing lewd or obscene song or words 94-3603 (5)	94-4107	94-4107	94-419 94-4118	48-105 94-705	94-3 et se Nuis 94-1
Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 94-3601										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
NEBRASKA										
28-921 et seq. chargeable with knowledge after service 28-921.01 search and seizure 28-921.01 Declara. judgment 28-926.01 926.05	28-290	Indecent exposure 28-290		Obscenity injunction 28-926.01 28-926.02 Nuisance defined 28-1016 Offensive matter nuisance 28-1014 Nuisances "Lewdness, assignation, or prostitution" 28-910	In presence of female 28-920 defined 28-936 child use 43-504	28-902	Seduction and fornication 28-927 928	28-919	28-904 et seq.	28-931 et seq. Injunction 28-911
Obscene defined: "...obscene, lewd, indecent, or lascivious..." 28-921										
NEVADA										
201.250 et seq. chargeable w/knowledge after summons 201.250 (4) (a) Minors 201.265	Open and gross lewdness 201.210 Registration of sex offenders 207.151 et seq.	Indecent exposure 201.220 Exhibition of "obscene indecent or immoral" show 201.253 Employment for indecent exhib. 609.210	Nudist colonies 444.070 Nudity defined 201.261 Nudity (minors) 201.265 (1) Nudity: see obscenity definition 201.250 (1) (b)	Public nuisance 202.450 .460 City power 266.350 Obscenity injunction 201.250 (4) (b)	Obscene calls, telephone 201.255	Grounds for divorce 125.010	(see sexual intercourse)	201.190	201.180	Advertising prostitution forbidden 201.430 et seq. Pandering 201.300
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor in description or represenciation of such matters." 201.250 (1) (b)										
NEW HAMPSHIRE										
571:14 et seq. City's power to restrain 47:17	579:3 et seq. 579:15	Indecent exposure 570:6 Indecent conduct 570:22 et seq.		Nuisances: "lewdness, assignation, or prostitution" 544:1 Immoral purposes chap. 544 Offensive businesses 147:15	Lascivious speech 570:25 570:2 :3 offense against morality 578:2 telephone 572:38-b 571:14	579:1 :2	579:4	579:9	579:7 457:1 et seq.	579:14 et seq. Nuisance 544:1 570:19
Obscene defined: "...obscene or lewd or lascivious..." 571:14										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
					NEW JERSEY				
2A:115-1 et seq. Pandering 2A:115-1.2 To minors 2A:115-1.3 115-3.2 Obscene comic books "...basic factor in impairing the ethical and moral development of our youth and constitute a clear and present danger to the people of the State." 2A:115-3.3 Prompt judgment 2A:115-3.6	Open lewdness or notorious act... tending to debauch morals 2A:115-1	Exposure: 2A:115-1 Indecencies in publication 2A:115-3		Nuisance: "gather...for purposes of gratifying themselves" 2A:130-2 120 N.J.L. 381 Municipal power 40:72-3 Obscenity injunction 2A:115-3.5 Nuisances: "prostitution, lewdness, or assignation" misdemeanors 2A:133-2	2A:140-2 Indecent communications to female 2A:115-4	2A:34-7 2A:88-1	2A:110-1	2A:143-1 -2	2A:114-1 et seq.

Obscenity:
1. Legislative findings: "The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jer
Statutes as amended and supplemented in recent years is unnecessarily permissive and a hindrance to effective legal action against ob
matter. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statute
language from influential opinions authored by certain United States Supreme Court justices; which language, however, does not repre
binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the Judiciary of this State." 2A:115-

2. Obscene defined: "...that which to the average person, applying contemporary community standards, when considered as a whole,
its dominant theme or purpose an appeal to prurient interest." 2A:115-1.1

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
					NEW MEXICO				
Power of municipalities to suppress 14-21-12 14-17-14		Exposure 40A-9-8		Nuisance: "injurious to public... morals..." 40A-8-1		40A-10-2		40A-9-6	40A-10-3
					NEW YORK				
Penal Code 235.00 et seq. Scienter presumptions PC 235.10 PC 235.22 to minors PC 235.20 PC 235. 21 Motion Picture films Educ. 122-a Seizure and forfeiture Penal 410.00		Indecent exhibitions Educ 3216-c At fairs or expositions Agric. and M 288 revocation of license for, vehicle and T 394 Indecency injunction Crim 22-a	Nudity defined PC 235.20 (2)	Obscenity injunction CPLR 6330 Obscenity town's power to prohibit Town 130 (11) Nuisance: "lewdness, assignation, or prostitution" Pub H 2320	Obscene gestures or lang. Penal Code 240.20 Abusive or obscene language in public Penal 240.25	Penal Code 255.17		Penal Code 130.00	Penal Code 255.25

Obscenity
1. Constitution. (liberty of conscience not to excuse acts of licentiousness.) Const art 1, Sec.3
2. Obscene defined: "...(a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex,
cretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such mat
and (c) it is utterly without redeeming social value." Penal Code 235.00

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST
					NORTH CAROLINA				
14-190.1 et seq. to minors 14-190.7 190.8 Adversary proceedings 14-190.2 & injunction	Lewd women within three miles of colleges 14-198	Indecent exposure 14-190.9 Indecent exposure, immoral shows 14-190	(see Infants)	Nuisances: "lewdness, assignation, prostitution, gambling, or (illegal sale of) whiskey or narcotic drugs" 19-1 et seq. Obscenity Injunction 14-190.2	Profane or indecent language 14 -195 telephone 14-196 profane or obscene language on highways 14-197	14-194	14-184	14-177	14-178 179

Obscene defined: "...(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and, (2) the mat
patently offensive because it affronts contemporary national community standards relating to the description or representation of sex
matters; and, (3) the material is utterly without redeeming social value; and, (4) the material as used is not protected or privileged u
the Constitution of the United States or the Constitution of North Carolina." 14-190.1 (b)

B-11

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					NORTH DAKOTA					
12-21-07 et seq. Munic. power to prohibit 40-05-01	lewdness unlawful 12-22-14(7) "Lewdness shall include any indecent or obscene act" 12-22-15 (3) Lewdness nuisance 12-22-14	Indecent exposure 12-21-10 Carnivals, indecent shows 53-03-03 Producing indecent material 12-21-10 House for indecent purposes 12-22-28 "Act which openly outrages public decency and is injurious to public morals" misdemeanor 12-22-01		Nuisances: "...offends decency..." 42-01-01 et seq. common nuisance: "for any other lewd, obscene, or indecent purposes..." 12-22-28,29 nuisances: "Prostitution lewdness, or assignation" 12-22-14	Obscene language 12-21-03 et seq. Blasphemy 12-21-01	12-22-09 et seq.	12-22-08 Unlawful cohabitation 12-22-12	12-22-07	12-22-06	12-22-14 et seq. Nuisance: Disorderly house 12-22-27
Obscene defined: "...obscene, lewd, salacious, or lascivious...or other matter of indecent character..." 12-21-07										
					OHIO					
2905.31 et seq. Search warrants 2905.35 Scienter presumption 2905.33 Minors 2903.33 et seq.	Exhibiting lewd pictures in saloon 2905.41	Indecent exposure 2905.30 Giving immoral exhibition 2905.40	Nudity defined 2905.34 Nudism prohibited 2905.31	Nuisances: "lewdness, assignation, or prostitution...lewd, indecent, lascivious or obscene films..." 3767.01 et seq. Obscenity enjoined 2905.37	715.55 2923.18 Munic. pwr. to forbid 715.55 profane, immoral, or indecent language 2905.40 obscene or licentious language before female or child 2905.30.1 Telephone 4931.31	2905.08 Dower barred for, 2103.05	2905.08 Indictment RC 2941.07	2905.44 2951.04 Giving immoral exhibitions of, 2905.40	2905.07	2905.12 et seq.
Obscene defined: 1. "...obscene, lewd, or lascivious...(material)..or article of an indecent or immoral nature...or show to a minor...stories of immoral deeds, lust, or crime..." 2905.34 2. "...considered as a whole and judged with reference to ordinary adults, any of the following apply: (1) Its dominant appeal is to prurient interest; (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite; (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." 2905.34 A										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					OKLAHOMA					
21-1021 et seq. 21-1040.8 et seq. seizure 21-1022 swift trial wi-1034 Oklahoma literature commission 21-1040.2 display of sexual intercourse on outdoor screen prohibited 21-1040.52	Lewd defined: "licentious, lecherous, dissolute, debauched, impure, salacious or pornographic" 21-1040.12	Indecent exhibition or exposure "private parts" "such as is offensive to decency... or to excite ...lewd thoughts." 21-1021 (second)		Nuisance: "...offends decency..." 50-1 Injunction 12-1397 Obscenity injunction 21-1032	21-901 et seq. Recording obscene or indecent language, songs, etc. 21-1021 (4) telephone 21-1172	21-871 et seq. Depiction of adultery forbidden 21-1040.51 Incestuous adultery 21-885	Showing sexual intercourse on outdoor screen (misdem.) 21-1040.52	21-886 -887 Showing unnatural copulation on outdoor screen 21-1040.52	21-885 43-2 21-157	21-1028 et seq.
Obscene defined: 1."...obscene filthy, indecent, lascivious, lewd or unfit..." 21-1040.8; 2. "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 21-1040.12 (other words defined: filthy, indecent, lascivious, and lewd 21-1040.12); 3. "(b) 'obscene literature'...any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or...comic books which... are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma." 21-1040.1 (b)										
					OREGON					
Obscene matter crime 167.151	Lewdness nuisance 465.110	Indecent exposure 167.145		Nuisances: "lewdness, assignation, or prostitution, or any other immoral act..." 465.110	166.060 school pupils 339.250	167.005 .050	167.030 .035 .050	167.040	167.035 .050	167.110 .115 .140 .120 .125 et seq. Nuisance 465.110
Obscene defined: "...if, considered as a whole, its predominant theme appeals to prurient interest, and if it is patently offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons." 167.151 (2)										
					PENNSYLVANIA					
18-4524 Complaint 18-783 Obscene comic books 18-3831 Injunction 18-3832.1 Censorship films 4-43	Nuisance 68-467 et seq.	Public indecency act 18-4519	Nudity defined 18-4524	Nuisances: "fornication, lewdness, and/or prostitution..." 68-467 Public Nuis. "detrimental to public health." 53-37320 Obscenity injunction 18-3832.1	18-632	18-4505	18-4506 Bldgs. used for, nuisance 68-467 et seq.	18-4501	18-4507 minor 18-5110	18-4513 et seq. 18-[illegible] Nuisance 68-467 53-3700 (24)
Obscene defined: "...that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest." 18-4524										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					RHODE ISLAND					
11-31-1 et seq. 11-31-1.1 et seq. to minors 11-31-10 11-31-14 Injunction 11-31-13 In rem proceeding 11-31.1-1	Lewdness nuisance 10-1-1 11-30-1 "lewd" see obscenity definition 11-31-10	Promotion of obscene shows 11-31-14 "indecent" see obscenity definition 11-31-10	Nude figures (minors) 11-31-14 11-31-10	Nuisances: "lewdness, assignation, or prostitution" 11-30-1 10-1-1 et seq. Advertising along highway 24-10-12 Obscenity injunction 11-31-13	32-2-12 13 11-11-5	11-6-2	11-34-5 Incestuous fornication 11-6-4	11-10-1	11-6-4 15-1-1 et seq.	11-45-1 11-34-1 et seq. Pandering 11-34-5 Nuisance 11-30-1
Obscene defined: 1. "...obscene..." 11-31-1; 2. to minors: "...devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion...or instrument of indecent or immoral use..." 11-31-10										
					SOUTH CAROLINA					
16-414 et seq. Pictures 16-415 Injunction 16-416 Prompt trial 16-418 Cumulative regulations 16-421 Minors 16-414.1 et seq.	Nuisance 10-1801 et seq. Receive for purpose of lewdness 16-409 (7)	Indecent exposure 16-413 Exhibiting indecent pictures 16-415		Nuisances: "lewdness, assignation, or prostitution" 10-1801 Nuisance "dangerous to human health" Vol. 17, p228 Obscenity injunction 16-416	Obscene message to women 16-552 telephone 16-552.1	16-406 et seq. grounds for divorce 20-101	16-406 16-408 Disqualifies voter 23-62 92	16-412	16-402	16-409 et seq. Nuisance 10-1801
Obscene defined: "...obscene, indecent or improper print (etc.)...manifestly tending to the corruption of the morals of youth..." 16-414										
					SOUTH DAKOTA					
22-24-1 et seq. to minors 22-24-13 et seq. nuisance 22-24-11 Munic. power to regulate not limited 22-24-23		Indecent exposure felony 22-24-1 et seq. 22-24-2.1 Outraging public decency and "injurious to public morals": 22-24-6 Procuring indecent exposure 22-24-2		Municipal power to remove 9-29-13 Zoning 11-4-7	Obscene language 22-13-7 Obscene or lascivious language in presence of women or children (also telephone) 22-24-5	22-22-17 18 Grounds for divorce 25-4-2		13-1716	22-22-19 22-22-20 25-1-6 13-1715	13-1717 et seq. Nuisance 21-10-10
					Singing, speaking obscene song, word, etc. 22-24-16					
Obscene defined: "(1)...that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme a purpose an appeal to prurient interest. (2) Prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and which as a matter of state public policy is utterly without redeeming social importance." 22-24-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					TENNESSEE					
39-3001 et seq. to minors 39-1012 et seq. Injunction 39-3005		Municipal power to prohibit indecent exhibitions 6-202	Nudist colony forbidden 39-3009 Nudity defined 39-1012	Nuisance: "violates the laws of decency" 39-2901 2902 (6 Tenn. App. 454) Obscenity injunction 39-3005	23-807 Obscene language 39-3001 telephone 39-3002	23-2601	23-2601	39-707	39-705 706	39-3501 et seq.

Obscene defined: "...obscene language or obscene prints... manifestly tending to corrupt the morals..." 39-3001

					TEXAS					
Title 10 Penal Code PC 527 et seq. Adversary Hearing PC 527 (8)(a) Municipal regulation allowed PC 527 (12) Obscenity injunction PC 527 (13) Comic books PC 528	Lewd women in theater PC 516 Lewdness defined PC 607	Indecent exhibition PC 526 Indecent exposure: PC 535 G Exposure to infant PC 474 535c Indecent exhibitions, films PC 612 Exposure public grounds PC 862	Nudity: see definition of "prurient interest" PC 527 (1)(B)	Common nuisances "drinking, gambling, prostitution" 4664 Obscenity injunction PC 527 (13)	Obscene language PC 474 5154 d-2 telephone PC 476	PC 499 500 501	PC 503 504	PC 524	PC 495 et seq.	Penal Cod 510 et seq. 607 609 667 1179 et se 5221 a Nuisanc 4664

Obscene defined: "(A)...material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) which is utterly without redeeming social val ue." "(B) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." title 10, Penal Code, Sec 527 (1) (A)and (B

					UTAH					
76-39-5 et seq. seizure 76-39-7 Injunction 76-39-10 Obscenity to minors 76-39-5 (8) Hard-core pornography to minors 76-39-5 (9) Constructive knowledge 76-39-8 Local regulation authorized 76-39-16	Open and gross lewdness; associating in lewd or lascivious or obscene manner 76-39-5(1)	Indecent exposure (misdem.) 76-39-5 76-39-13	Nudity: see definition of obscenity: 76-39-11	Nuisance: "...indecent or offensive to senses..." 76-38-1 Public nuisance: "...(2) offends public decency..." 76-43-1 City power to declare and abate nuisance 10-8-60 Obscenity injunction 76-39-10 Nuisance: "lewdness, assignation, or prostitution" 47-1-1	Songs, ballads, or other lewd or obscene words in public place 76-39-5(5) 76-38-13	76-53-3	76-53-5 (misdem.)	76-53-22	76-53-4	76-53-2 et seq. 76-53-11 76-53-9 77-31-14 76-61-1 City pow to suppr 10-8-41 Nuisanc 47-1-1

Obscene defined: "...whether to the average person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest...Prurient interest shall mean a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." 76-39-11

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					VERMONT					
13-2801 et seq. to minors 13-2801 et seq. Obscene motion pictures 13-2803	open and gross lewdness 13-2601	Exhibiting obscene, lewd or indecent picture...or presents indecent or immoral show 13-2802		Power of Municipalities 24-2121		13-201 202 203		Fellation 13-2603 2601		13-2631 13-2632 house of ill fame 13-2604
Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2801										
					VIRGINIA					
18.1-227 et seq. May be enjoined 18.1-236.3		Indecent exposure 18.1-214 18.1-236 to Child 18.1-214	Nudity: see obscenity definition 18.1-227 Sexual Displays 27-416 A-G	Obscenity injunction 18.1-236.3 Municipal Power 15.6	Swearing 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-194 et seq.
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
					WASHINGTON					
9.68.000 et seq. "Erotic material" defined 9.68.050 Placing "adults only" label 9.68.060 (3) (a) Comic books 7.42.010 et seq.	Lewdness 9.79.120 Sale of lewd publication 40.37.130 Nuisance: 7.48.050 Injunction 7.42.010	Indecent exposure 9.79.080 9.79.120 Indecent articles 9.68.030		Nuisance: "offend public decency" 9.66.010 Nuisances: "lewdness, assignation, or prostitution" 7.48.050 Obscenity injunction 7.42.010 et seq.	Indecent or vulgar language 9.68.040 in public conveyances 9.27.030 telephone 9.61.230	9.79.110 120	False charge of 4.24.120	9.79.100	9.79.090	9.79.10 Nuisance 7.48.050
Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;..." 9.68.050 (2); 2. "Prohibited publications": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute (except concerning public welfare)..." 9.68.020										
					WEST VIRGINIA					
61-8-11 tending to corrupt youth 61-8-11 Pornographic publications [illegible] [illegible]	Lewd and lascivious cohabitation 61-8-4 open and gross lewdness Nuisance: Lewdness 61-9-1	Indecent exposure 61-8-28 Immoral shows prohibited -fairs- 19-7-8		Equitable remedies in aid of chastity, morality and decency: Article 9 61-9-1 et seq. Nuisance: "lewdness, assignation, or prostitution" 61-9-1	Profanity, obscene, indecent or vulgar language (& telephone) 61-9-16 Profane swearing 6-10-15	61-8-3	61-8-3- Lewd and lascivious cohabitation 61-8-4-	Crimes against nature 61-8-13	61-8-12	61-8-5 et seq. Nuisance 61-9-1
Obscene defined: "...obscene language...or description manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA-TION	SODOMY	INCEST	PRO TI
					WISCONSIN					
944.21 .22 .23	Lewd and lascivious behavior: "sexual gratification in presence of others; or publicly exposes sex organ; or openly co-habits with one not his spouse" 944.20 Nuisance lewdness 280.09	Makes lewd, obscene or indecent drawings 944.22 Indecent exposure 944.20 et seq. Indecent articles 450.11	Nudity defined: 944.25 (1) (h) Nudity (minors) 944.25 (1) (j) (i)	Nuisance: "...any source of filth or cause of sickness..." 146.14 Nuisances: "lewdness, assignation, or prostitution," 280.09	telegraph or telephone 196.625	944.16	944.15	944.17	944.06	944.1 et se Nuisa 280.0
Obscene defined: "...lewd, obscene or indecent..." 944.21										
					WYOMING					
6-103 104	Defined: 6-90 Nuisance 7-453	Indecent exposure 6-102 Indecent matter in pleading R.C.P., Rule 11 (a) Offenses as to schools 21-36		Nuisances: "lewdness, assignation, prostitution, or gambling ..." 7-453 454 Protection of minors 14-12 Public nuisance defined "house of ill fame, prostitution, gambling, (illegal) liquor..." 6-107	Uttering obscene or licentious language in public 6-102	6-86	6-86	6-98	6-85	6-87 et se Nuisa 7-45 6-107
Obscene defined: "...obscene, lewd, indecent, or lascivious (matter)...or article of indecent or immoral use..." 6-103										

APPENDIX C

TIME-MOTION STUDY* OF FILM "ANIMAL LOVER"**

C-1 thru C-22

---

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

** Exhibited at Old Chelsea Theatre, Denver, Colorado on July 18, 1972. See Footnote 7.

"ANIMAL LOVER"
(Part 1 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

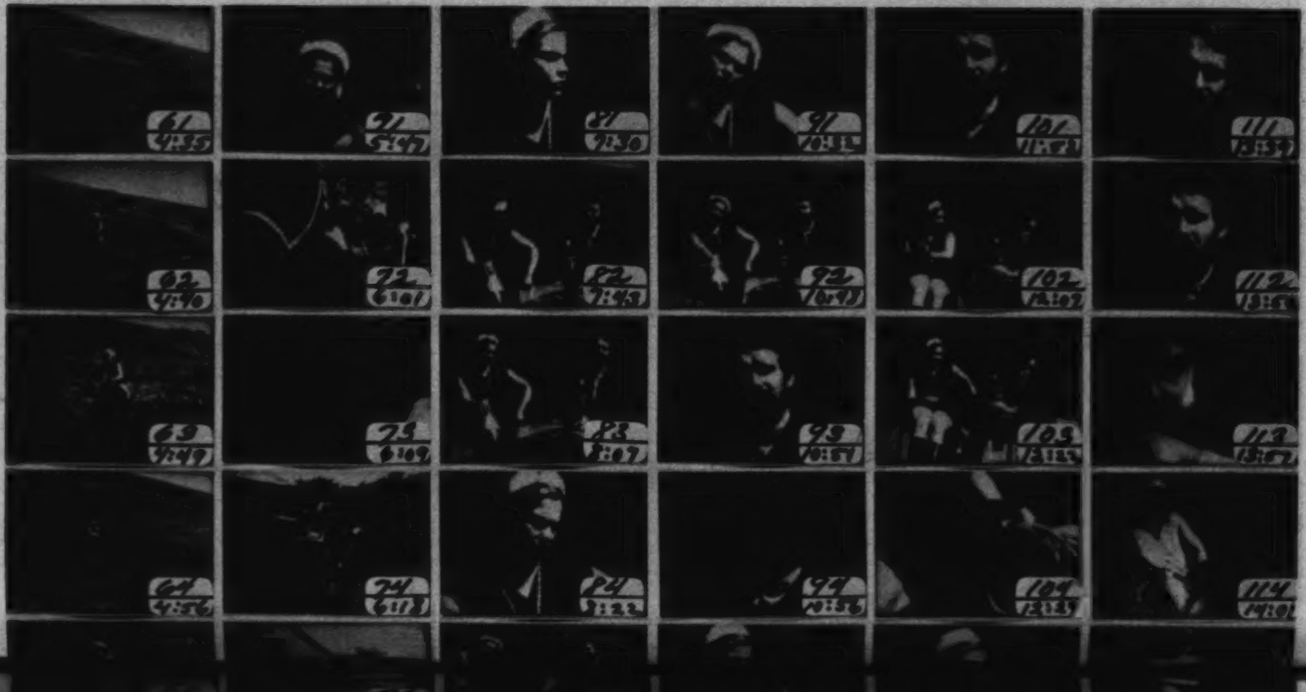
GRØNDAHL Film Presents
Produced in Denmark By WILLY BORG
Directed By FREDDY HANSEN
ANIMAL LOVER
1
2
3
4
11
12
13
14
21
22
23
24
31
32
33
34
41
42
43
44
51
52
53
54

Photographed By
POUL MØLLER
Sound By KNUD JAC
PASSION
Produced In Denmark
By WILLY BORGS
7
8
9
10
17
18
19
20
27
28
29
30
37
38
39
40
47
48
49
50
57
58
59
60

Credits 1-16; interviews on street 17-27; photographs of pornography in print 28-44; interviews 45-47; interviews on farm 48-60.

"ANIMAL LOVER"
(Part 2 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.


61
71
81
91
101
111
62
72
82
92
102
112
63
73
83
93
103
113
64
74
84
94
104
114

67
5:20
77
6:42
87
9:19
97
11:18
107
13:01
117
14:15
68
5:25
78
6:47
88
9:35
98
11:30
108
118
14:20
69
5:29
79
6:59
89
9:52
99
11:41
109
119
70
5:41
80
9:21
90
10:14
100
11:51
110
120

Interviewer interviews female "animal lover" in Denmark in outdoor sceen 61-112; female sits on floor with dog and starts to undress 113-120.

"ANIMAL LOVER"
(Part 3 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

121 14:35
131 15:10
141 15:40
151 16:12
161 16:42
171 17:11
122 14:40
132 15:12
142 15:43
152 16:15
162 16:45
172 17:13
123 14:45
133 15:15
143 15:46
153 16:17
163 16:47
173 17:15
124 14:47
134 15:17
144 15:51
154 16:20
164 16:50
174 17:17

Female, sitting on floor, exposes her vagina to dog's face 120-180.

"ANIMAL LOVER"
(Part 4 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

171
17:54
172
17:36
173
17:37
174
17:40
191
17:58
192
18:04
193
18:11
194
18:14
201
18:28
202
18:30
203
18:32
204
18:33
211
18:42
212
18:49
213
18:50
214
18:52
221
19:06
222
19:08
223
19:10
224
19:12
231
19:25
232
19:27
233
19:29
234
19:31

Dog's face in area of female's vagina 181-190; female masturbates dog's penis 191-211; female places dog's penis in her mouth 212-240.

"ANIMAL LOVER"
(Part 5 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

247
257
267
277
287
297
248
258
268
278
288
298
249
259
269
279
289
299
250
260
270
280
290
300

Female places dog's penis in her mouth 241-243; female masturbates dog 244-251; female places dog's penis in her mouth 252-263; female masturbates dog 264-288; female straddles dog and places dog's penis in her vagina area 289-293.

"ANIMAL LOVER"
(Part 6 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

307
317
327
337
347
357
308
318
328
338
348
358
309
319
329
339
349
359
310
320
330
340
350
360

Female straddle dog with vagina over dog's penis 301-311; female masturbates dog's penis 312-340; female places tongue on dog's penis 342-350. female masturbates dog's penis 351-357; interview 358-360.

"ANIMAL LOVER"
(Part 7 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

Interviews 361-367; nude female lies on floor alongside pig with her vagina opposite his penis 368-391; female places pig's penis in her mouth 392-420.

"ANIMAL LOVER"
(Part 8 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

Female places pig's penis in her mouth 421-424; female lies alongside pig 425-434; female sitting on floor exposes her vagina to pig's snoot 435-466; interviews 467-480.

"ANIMAL LOVER"
(Part 9 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

Interviews 480-492; female outdoors with horse 493; female masturbates horse's penis 493-500; female places horse's penis in her mouth 501-506; female masturbates horse 507-521; female undresses 522-528; female, now nude, masturbates horse 529-532; female faces away from horse and places horse's penis in contact with her anal area 533-540.

"ANIMAL LOVER"
(Part 10 of 11 Parts)

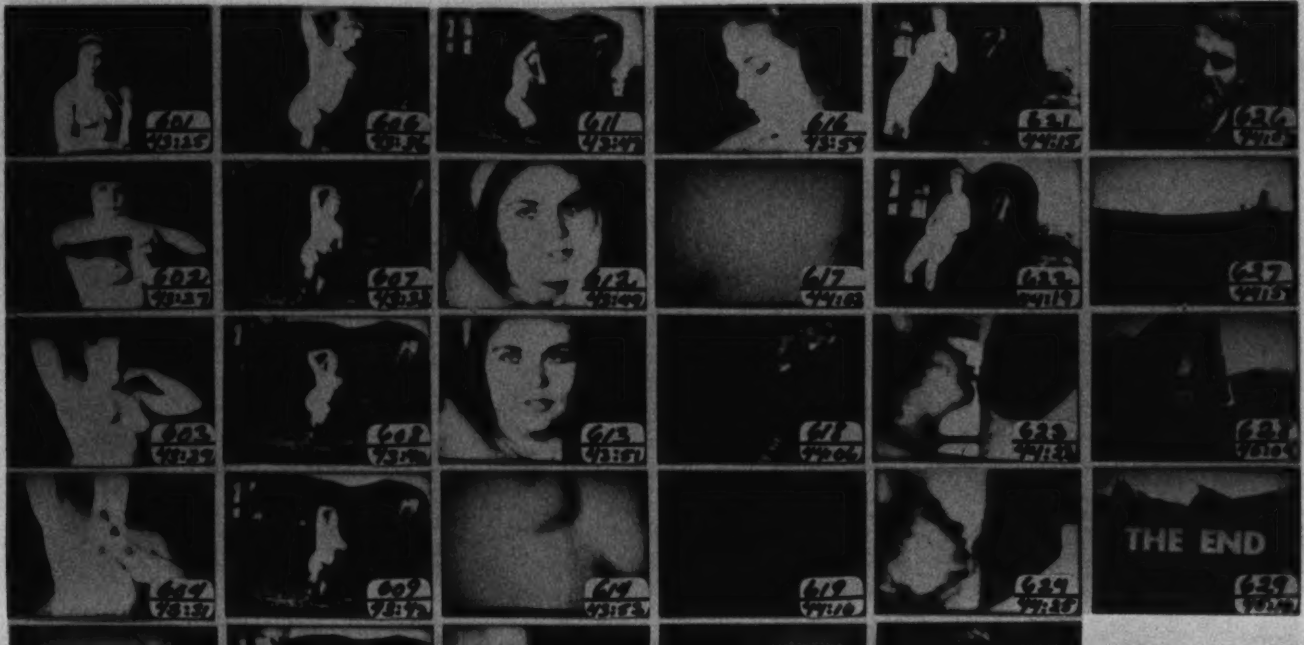
Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

Horse's penis in contact with female's anal area 541-547; female faces horse and places horse's penis in contact with her vagina 548-557; female places horse's penis in her mouth 558-575; female places plastic container over horse's penis and camera photographs horse's ejaculation 576-600.

"ANIMAL LOVER"
(Part 11 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.

Female faces audience and gestures 601-622; female kisses horse 623-624; interviews 625-628; The end 629.



APPENDIX D

TIME-MOTION STUDY* OF FILM "DEEP THROAT"**

D-1 thru D-28

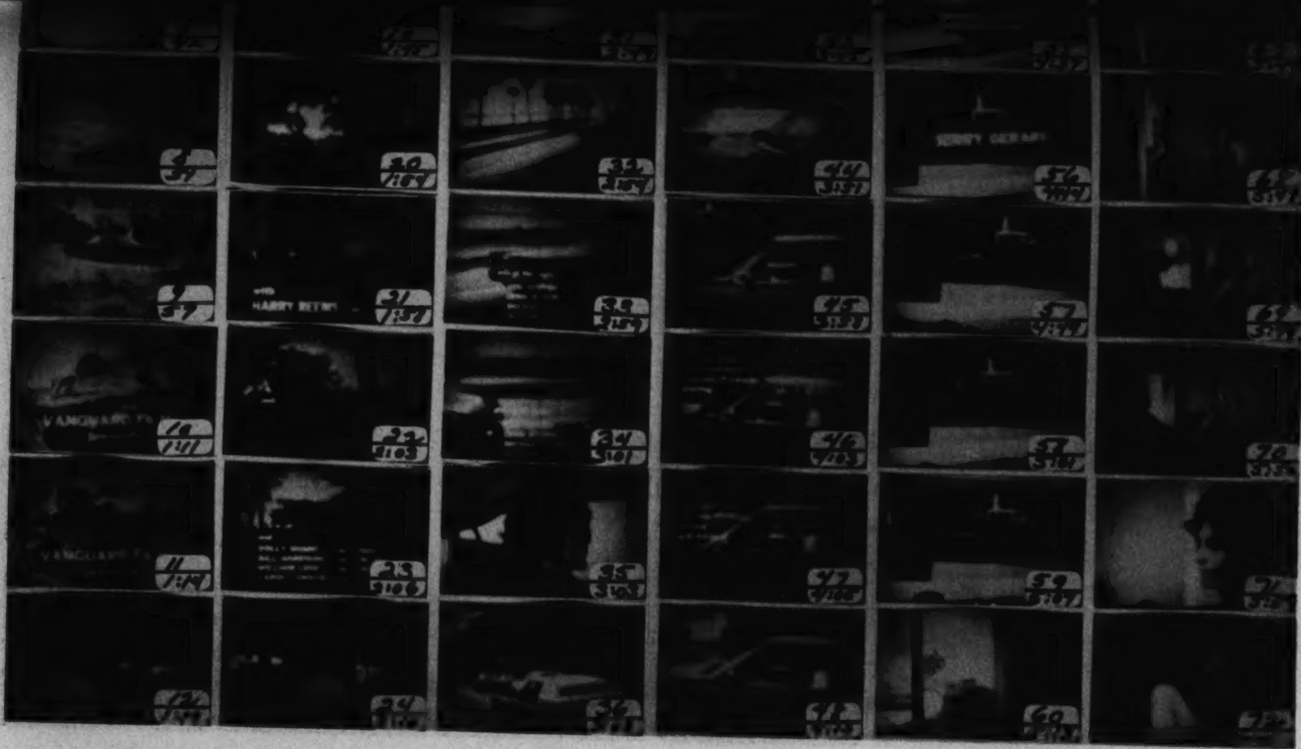
* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

** Exhibited generally in U.S. and at the New Plaza, Washington, D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City, during the period Aug. thru Nov. 1972. See Footnote 8.

"DEEP THROAT"
(Part 1 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

DEE
DEEP THRO
DEEP THROAT
DEEP THROAT
introducing LINDA LOVELACE
produced by
produced by LOU



Producer's Editorial Comment 1-4; Opening scenes 5-9; Credits. In background Linda Lovelace drives her car home; car pulls into driveway 10-56; Linda enters house 57-61; Linda's roommate, Joan, is seated on a table with her legs outspread. A male is performing cunnilingus 62-72.

"DEEP THROAT"
(Part 2 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Cunnilingus; Joan asks male companion "Mind if I smoke while you're eating?" Male companion, "Not at all." 73-81; Linda leaves 82-84. Cunnilingus resumed, with camera focusing on vagina and facial expressions of Joan 85-121; at poolside 122-128; Linda complains to Joan about the way they live, "There's got to be more to life than just screwing around." 129-144.

POOR COPY

"DEEP THROAT"
(Part 3 of 14 Parts)

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Poolside conversation, Linda tells Joan she doesn't enjoy it. She doesn't hear bells ringing or bombs going off. Joan replies, "Maybe you're not doing it right." 145-153; car approaches with two males 154-156; Males are greeted by Joan 157-160; Joan: "You have eleven . . . you have twelve." 161-162; "Have a drink, relax, wait til your number is called . . . . Everybody gets a little piece of this action." 163-164; Male performs sodomy on Linda 165-199; male penis ejaculates on buttocks 202-207; sodomy resumed 209-216.

"DEEP THROAT"
(Part 4 of 14 Parts)

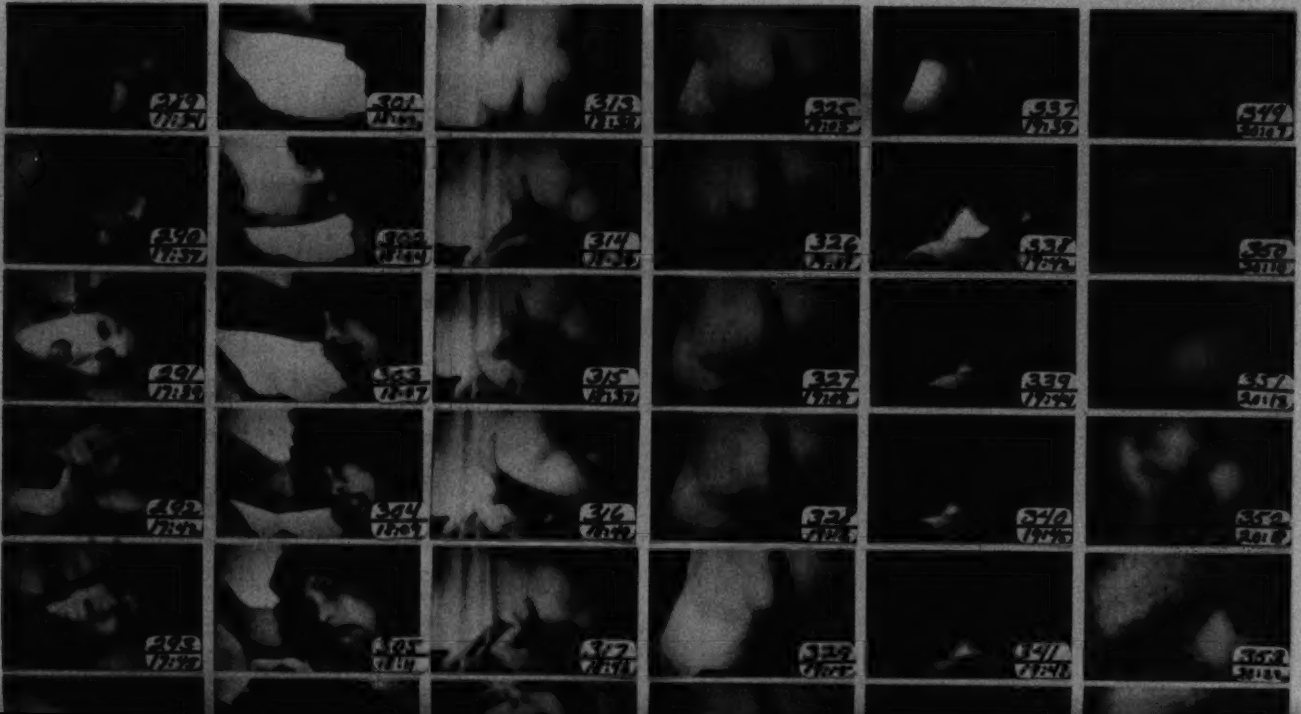
Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

D-9

Anal sodomy on female 217-222; oral sodomy by female 223-234; anal sodomy on female 245-264; oral sodomy by female 265-268; cunnilingus 271-279; oral sodomy by female 282-288.

"DEEP THROAT"
(Part 5 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.



D-10

Oral sodomy by female 289-290; sexual intercourse 291-297; oral sodomy by female 298-312; cunnilingus 313-319; sexual intercourse, male standing 321-355; sexual intercourse, female on top 356-360.

"DEEP THROAT"
(Part 6 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Sexual intercourse, female on top 361-366; Linda complains. Joan suggests she visit psychiatrist 372-375; Linda discusses problems with psychiatrist at his office 376-379; Linda wants more than tingles and to hear bells ringing and bombs bursting 380-391; doctor gives Linda internal examination; discovers she has no clitoris 392-410; doctor asks what excites her most. Linda replies ''giving head'' and that the excitement is in her throat 410-420; doctor tells Linda her clitoris is at the bottom of her throat 421-425; doctor: ''We have the problem

"DEEP THROAT"
(Part 7 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

D-15

Linda: "I try, but I choke." Doctor: "You have to learn to relax your muscles." 433-440; Linda performs oral sodomy on psychiatrist 441-497; Linda hears bells while performing sodomy 498-504.

"DEEP THROAT"
(Part 8 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

512
524
572
513
525
537
549
573
514
538
562
515
527
539
563
575
516
540
564
576

Oral sodomy 505-507; bells ringing 508; oral sodomy 509; rockets bursting 510-511; oral sodomy 512-521; rockets taking off 522; oral sodomy 523; rockets taking off 524-526; bells ringing 527-528; oral sodomy 529-551; rockets bursting 552; oral sodomy 553; Linda tongues erect penis 554-558; Linda asks doctor to marry her 559-562; doctor refuses but offers her position in his office 563-569; Linda becomes a nurse in office 571-576.

"DEEP THROAT"
(Part 9 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Linda visit patient 577; patient undresses 578-585; patient sits on table and Linda performs oral sodomy 586-591; patient, standing, has intercourse with Linda, sitting on table 593-607; patient pours Coke on vagina and drinks Coke with straw 608-615; psychiatrist dictates report on male patient (who has obsession as to whether things really do go better with Coke) as blond nurse performs oral sodomy on psychiatrist 616-619; sexual intercourse between Linda and patient as patient sips through straw

"DEEP THROAT"
(Part 10 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

656
657
658
659
660
668
669
670
671
672
680
681
682
683
684
692
693
694
695
696
704
705
706
707
708
716
717
718
719
720

Linda at residence 649-651; patient is male widower who has pains in groin from sexual abstenance 651-656; Linda undresses to relieve him of his pain 656; as Linda leaves, patient tells her he wants further treatment, money is no object for he has Blue Cross 657-661; Linda treats another patient 662-667; psychiatrist dictates report (on his own case history and relations with Linda and blonde nurse) while performing anal sodomy on blonde nurse 668-682. Linda treats second patient

POOR COPY

"DEEP THROAT"
(Part 11 of 14 Parts)

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Linda removes bandage from penis 721-729; camera shifts alternately to sexual activity of blonde nurse and Linda; psychiatrist performing anal sodomy on blonde nurse 730-736; Linda performing oral sodomy on patient 737; blonde nurse performing oral sodomy on doctor 738; Linda performing oral sodomy on patient 739-741; blonde nurse performing oral sodomy on psychiatrist 742-745; intercourse, female on top 750-751; oral sodomy by Linda 752; intercourse, female on top 753-756; oral sodomy by Linda on patient 760-770; sexual intercourse, male on

"DEEP THROAT"
(Part 12 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Oral sodomy by Linda on psychiatrist 793-819; sexual intercourse 820-830; Linda performs oral sodomy 831-836; male in mask enters Linda's residence and watches her shave her pubic area 841-864.

"DEEP THROAT"
(Part 13 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Psychiatrist performs cunnilingus on blonde nurse as nurse dictates case history of patient; Linda is now treating (patient is only sexually aroused when his sexual partner is in fear of being raped) 865-867; Linda leaves bathroom and is met by masked intruder Wilbur; Linda indicates willingness and frustrates Wilbur 868-883; Linda tells Wilbur she is really attracted to him 884; Wilbur proposes marriage 885; Linda tells Wilbur the man she marries must "have an 8-inch cock" 886-892; Wilbur phones doctor Young 893-898; Wilbur tells Linda the doctor

"DEEP THROAT"
(Part 14 of 14 Parts)

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

Bells ring 937-938; as Linda performs oral sodomy 939-940; rockets ascend, bells ring, rocke
burst 941-946; as Linda continues oral sodomy 949-964; Linda and Wilbur lie side by side o

APPENDIX E

TIME-MOTION STUDY* OF FILM "STICKY SITUATION"**

E-1 thru E-30

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at the Playhouse, Washington, D.C. during Sept.-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See Footnote 8.

"STICKY SITUATION"
(Part 1 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

STICKY SITUATI
1
19
2
20
3
24
4
27
5
13
1:06
14
1:09
15
1:13
16
1:16
17
25
2:02
26
2:07
27
2:11
28
2:15
29
37
2:53
38
2:57
39
3:03
40
3:08
41
49
3:53
50
4:02
51
4:07
52
4:10
53
61
4:46
62
4:49
63
4:54
64
4:57
65

5/30
17/1:20
29/2:19
41/3:12
53/4:13
7/35
19/1:29
31/2:27
55/4:20
8/39
20/1:35
32/2:31
44/3:28
56/4:24
68/5:15
9/44
21/1:39
33/2:36
45/3:33
57/4:29
69/5:19
10/50
22/1:45
34/2:40
46/3:37
58/4:33
70/5:27
11/56
23/1:49
35/2:48
47/3:41
59/4:38
71
12/1:01
24/1:55
36
48
60/4:45
72

Credits 1-7; Mary, manager of motel, shows Paul room 8-9; Throughout film, sound track presents off stage voices which tell one story – screen depicts activities which parallel story being "told" off stage, voices of "Paul" and "Mary" tell story; Motel manager Mary put Paul in a room with a two-way mirror which permitted him to look into the room which Mary shares with Lyn. Lyn enters and disrobes 11-34, Paul watches as she

"STICKY SITUATION"
(Part 2 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

73 5:30
85 6:41
97 7:35
109 8:20
121 8:52
133 9:26
74 5:34
86 6:46
98 7:40
110 8:22
122 8:54
134 9:29
75 5:37
87 6:50
99 7:44
111 8:25
123 8:58
135 9:31
76 5:41
88 6:55
100 7:49
112 8:29
124 9:02
136 9:34
77 5:45
89 6:59
101 7:52
113 8:30
125 9:04
137 9:37

80 6:05
81 6:09
82 6:13
83 6:18
84
91 7:07
92 7:11
98 7:15
94 7:20
95 7:25
96
104 8:05
105 8:07
106 8:11
107 8:15
108
115
116
117 8:40
118 8:43
119 8:46
120
127 9:09
128 9:12
129 9:16
130 9:18
131 9:23
132 9:24
140 9:45
141
142 9:51
143 9:54
144

Mary enters from shower and commences lesbian activities with Lyn 73-102; Cunnilingus by Mary on Lyn 102-103; lesbian love 104-120; cunnilingus by Mary on Lyn 121-144.

"STICKY SITUATION"
(Part 3 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

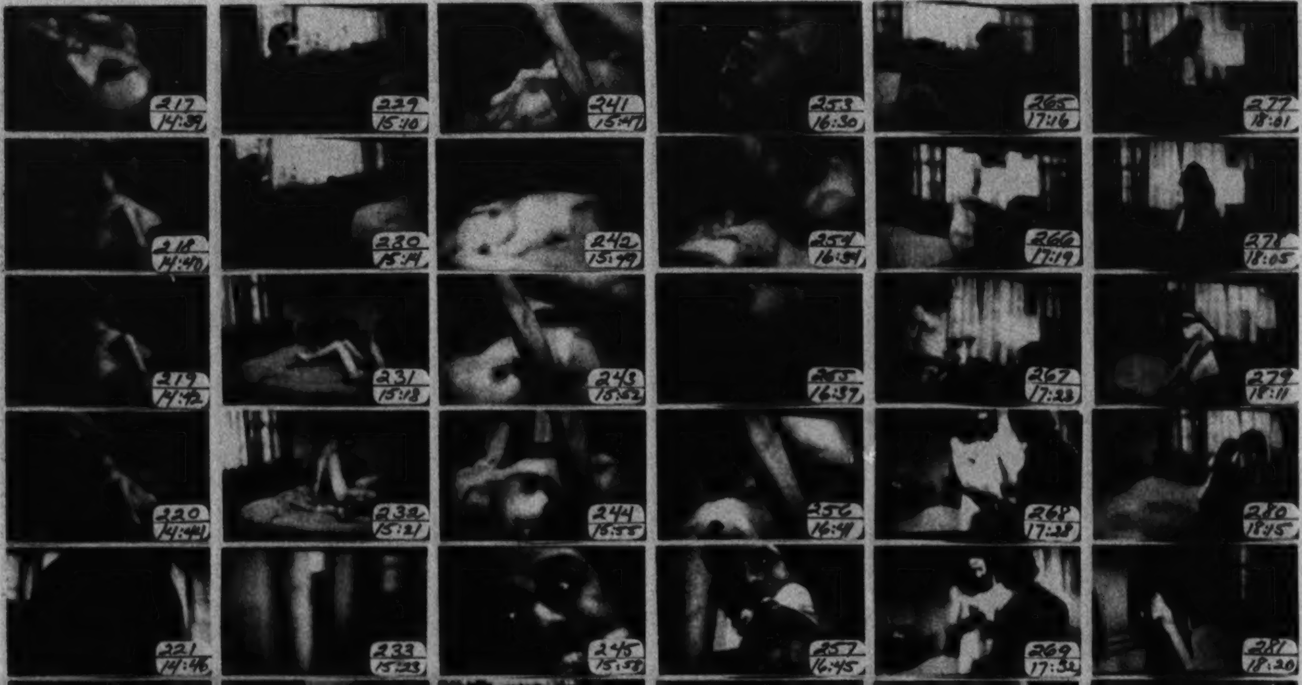
145 10:01
157 10:49
169 11:51
181 12:41
193 13:26
205 14:09
146 10:05
158 10:53
170 11:56
182 12:46
194 13:31
206 14:13
147 10:08
159 10:57
171 12:01
183 12:50
195 13:34
207 14:15
148 10:11
160 11:04
172 12:04
184 12:53
196 13:37
208 14:16
149 10:13
161 11:08
173 12:07
185 12:56
197 13:41
209 14:20

151 10:20
163 11:13
175 12:16
187 13:05
199 13:47
211 14:05
152 10:22
164 11:23
176 12:21
188 13:08
200 13:30
212 14:26
153 10:26
165 11:28
177 12:24
189 13:11
201 13:53
213 14:29
154 10:29
166 11:33
178 12:29
190 13:14
202 13:57
214 14:32
155 10:33
167 11:40
179 12:34
191 13:19
203 13:59
215 14:54
156 10:40
168 11:47
180 12:37
192 13:23
204 14:05
216 14:57

Cunnilingus by Mary on Lyn 145-153; off stage voice of Paul tells his problems; he is a voyeur who is unable to perform sexually. Lyn and Mary try to cure him; Paul watches TV with Lyn 164-165; Jesus, Mary and Lyn's friend (unknown to Paul) enters, ties Paul to a chair and gags him (167-178) at knife point, Mary is forced to disrobe 178-186; intercourse 187-193; cunnilingus on Mary 194-196; fellatio by Mary 198-216.

"STICKY SITUATION"
(Part 4 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.


217 14:39
229 15:10
241 15:47
253 16:30
265 17:16
277 18:01
218 14:40
230 15:14
242 15:49
254 16:34
266 17:19
278 18:05
219 14:42
231 15:18
243 15:52
255 16:37
267 17:23
279 18:11
220 14:44
232 15:21
244 15:55
256 16:41
268 17:28
280 18:15
221 14:46
233 15:23
245 15:58
257 16:45
269 17:32
281 18:20

E-9

223
14:51
224
14:53
225
14:56
226
14:59
227
15:01
228
15:04
235
15:29
236
15:33
237
15:35
238
15:37
239
15:41
240
15:44
247
16:07
248
16:11
249
16:15
250
16:18
251
16:24
252
16:26
259
16:55
260
16:57
261
17:02
262
17:06
263
17:10
264
17:14
271
17:40
272
17:44
273
17:46
274
17:51
275
17:54
276
17:58
283
18:29
284
18:33
285
18:36
286
18:40
287
18:44
288
18:48

Fellatio by Mary 217-232; intercourse between Mary and Jesus as Paul watches 234-260; Jesus unties Paul and shakes his hand 268-275; female makes up bed 276-288.

"STICKY SITUATION"
(Part 5 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

289 18:51
290 18:54
291 18:58
292 19:01
293 19:06
301 19:44
302 19:48
303 19:52
304 19:55
305 20:01
313 20:48
314 20:44
315 20:57
316 21:03
317 21:08
325 21:43
326 21:47
327 21:51
328 21:55
329 22:06
337 22:33
338 22:36
339 22:40
340 22:43
341 22:46
349 23:10
350
351
352
353

296 19:18
308 20:16
320 21:24
332 22:18
344 22:53
297 19:23
309 20:20
321 21:28
333 22:22
345 22:55
357
310
322 21:32
334 22:24
346 22:58
299 19:33
311 20:34
323 21:37
335 22:26
347 23:02
300
312
324
336
348
360

Off stage voice of Mary tells of her attempt to arouse Paul sexually (via the two-way mirror) by exposing herself in sexual activity. During the off stage converation, screen shows Mary arousing herself sexually by self stimulation 293-350.

"STICKY SITUATION"
(Part 6 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

361
362
364
365
373
374
376
377
385
386
387
388
389
397
398
399
400
401
409
410
411
412
413
421
424
425

E-13

367
368 25:14
369 25:18
370 25:23
371
372
379
380 25:58
381 26:01
382 26:04
383 26:07
384 26:11
391
392 26:46
393
394 26:52
395 27:01
396
403 27:24
404 27:27
405 27:31
406 27:35
407 27:39
408 27:47
415 28:13
416 28:16
417 28:19
418 28:23
419 28:26
420
427
428 28:50
429 28:53
430 28:56
431
432 29:01

Female makes up bed 361-363; off stage voices of Mary and Paul discuss Paul's attempt to "make it with Mary"; on screen, Paul sits on bed next to Mary 364-370; Mary takes out electric vibrator and places it at her vagina with other hand on Paul's genital area 371-377; Mary helps undress Paul 383-399; Mary undresses 400-408; Mary performs fellatio on Paul 409-417, using the vibrator on her vagina 420-423; Paul feels "left out" and turns on

"STICKY SITUATION"
(Part 7 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

433 29:03
434 29:06
435 29:09
436 29:11
445 29:31
446 29:33
447 29:36
448 29:39
457 30:01
458 30:03
459 30:06
460 30:08
469 30:58
470 31:02
471 31:08
472 31:16
481 32:08
482 32:13
483 32:16
484 32:21
494 32:51
495 32:54
496 32:56

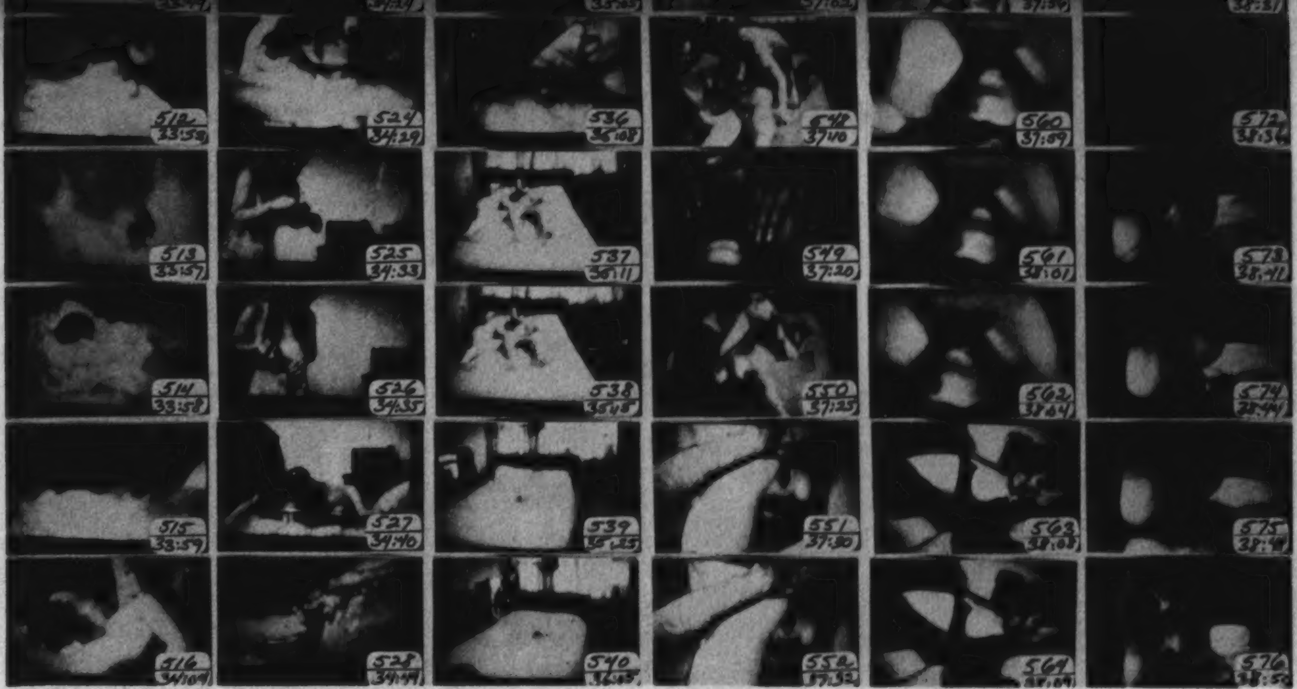
475
31:38
440
29:21
452
29:49
464
30:18
476
31:47
488
32:55
500
33:09
441
29:23
453
29:51
465
30:21
477
31:48
489
32:58
501
33:11
442
29:26
454
29:53
466
30:38
478
31:53
490
32:41
502
33:19
443
29:28
455
29:56
467
30:44
479
31:58
491
32:44
503
33:23
444
29:29
456
29:58
468
30:56
480
32:05
492
32:47
504
33:28

Mary continues masturbation with vibrator 433-462; Female makes up bed 463-471; Paul joins Mary on bed and sprays her nude body with whip cream 476-504.

"STICKY SITUATION"
(Part 8 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

505
517 34:08
529 34:47
541 36:10
553 37:35
565
506
518 34:13
530 34:50
542 36:15
554 37:40
566
507 33:38
519 34:15
531
543 36:23
555 37:43
567
508 33:41
520 34:17
532 34:58
544 36:42
556 37:46
568
509 33:44
521 34:19
533 35:01
545 36:48
557 37:50
569


512
33:53
524
34:29
536
560
37:59
572
513
33:57
525
34:33
537
549
37:20
561
573
514
33:58
526
34:35
538
550
37:25
562
574
515
33:59
527
34:40
539
551
37:30
563
575
516
528
34:44
540
552
37:32
564
576

Paul eats whip cream from Mary's body 505-513; cherry from vaginal area 514-518; Mary sprays Paul's genitals with whip cream 519-526 and eats the whip cream 527-538; Female changes bed clothes 539-541; Paul lies on bed nude with Mary and Lyn alongside 542; Mary performs fellatio 544-547; Lyn straddles Paul with her buttocks in his face 548; Paul performs cunnilingus on Lyn 549-552; Mary performs fellatio on Paul 553-555; Lyn undresses while Paul performs cunnilingus; Mary undresses while performing fellatio 563-568; Mary places penis

"STICKY SITUATION"
(Part 9 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

577 38:55
589 39:30
601 40:14
613 41:26
625 42:13
637 42:52
578 38:59
590 39:32
602 40:20
614 41:28
626 42:16
638 42:54
579 39:02
591 39:34
603 40:24
615 41:31
627 42:20
639
580 39:09
592 39:38
604 40:31
616 41:36
628 42:23
640
581 39:07
593 39:40
605 40:36
617 41:40
629 42:38
641 43:02

584 39:15
596 39:03
608 40:53
620 41:50
632 42:37
644 43:10
585 39:18
597 39:56
609 41:09
621 41:54
633 42:41
645 43:15
586 39:21
598 39:59
610 41:14
622 41:59
634 42:44
646 43:17
587 39:25
599 40:03
611 41:18
623 42:03
635 42:47
647 43:20
588 39:28
600 40:10
612 41:22
624 42:08
636 42:51
648 43:23

Paul performs cunnilingus on Lyn as Mary moves against his penis 577-594; Paul is unable to perform sexually; "Sorry girls – it's just like the other time" 595; Female makes up bed 596-603; off stage voices of Mary and Lyn discuss Paul's reaction as he watched "Maggie" perform with a negro, Simon. Paul tells Lyn and Mary his problems started after he came unexpedtedly upon the girl he was living with performing sodomy on a negro. "On screen," Maggie is in bed with negro Simon 604-619; Simon whips her 620-622; Maggie performs fellatio on negro, Simon 625-648

"STICKY SITUATION"
(Part 10 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

649 43:25
661 44:06
673 44:32
685 45:08
697 46:39
709 48:03
650 43:29
662 44:07
674 44:34
686 45:12
698 46:42
710 48:15
651 43:33
663 44:09
675 44:36
687 45:15
699 46:50
711 48:20
652 43:36
664 44:12
676 44:38
688 45:51
700 47:02
712 48:25
653 43:37
665 44:14
677 44:41
689 45:56
701 47:05
713 48:30

656
657
658
659
660
668
669
670
671
672
680
681
682
683
684
692
693
694
695
696
703
704
705
706
707
708
715
716
717
718
719
720

Sexual intercourse between Maggie and Simon 650-676; Maggie performs fellatio on negro Simon 677-693; off stage voice of Lyn tells Paul of how she met Jesus; Jesus was lying in bed in a trance 697-704; Lyn and a second female engage negro Simon in sexual intercourse as Jesus is lying in a trance on the bed 705-720.

"STICKY SITUATION"
(Part 11 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

721 49:05
733 49:55
745 50:44
757 52:03
769 53:32
781 54:31
722 49:09
734 49:59
746 50:49
758 52:08
770 53:35
782 54:34
723 49:13
735 50:03
747 50:53
759 52:28
771 53:39
783 54:39
724 49:18
736 50:08
748 50:56
760 52:35
772 53:47
784 54:42

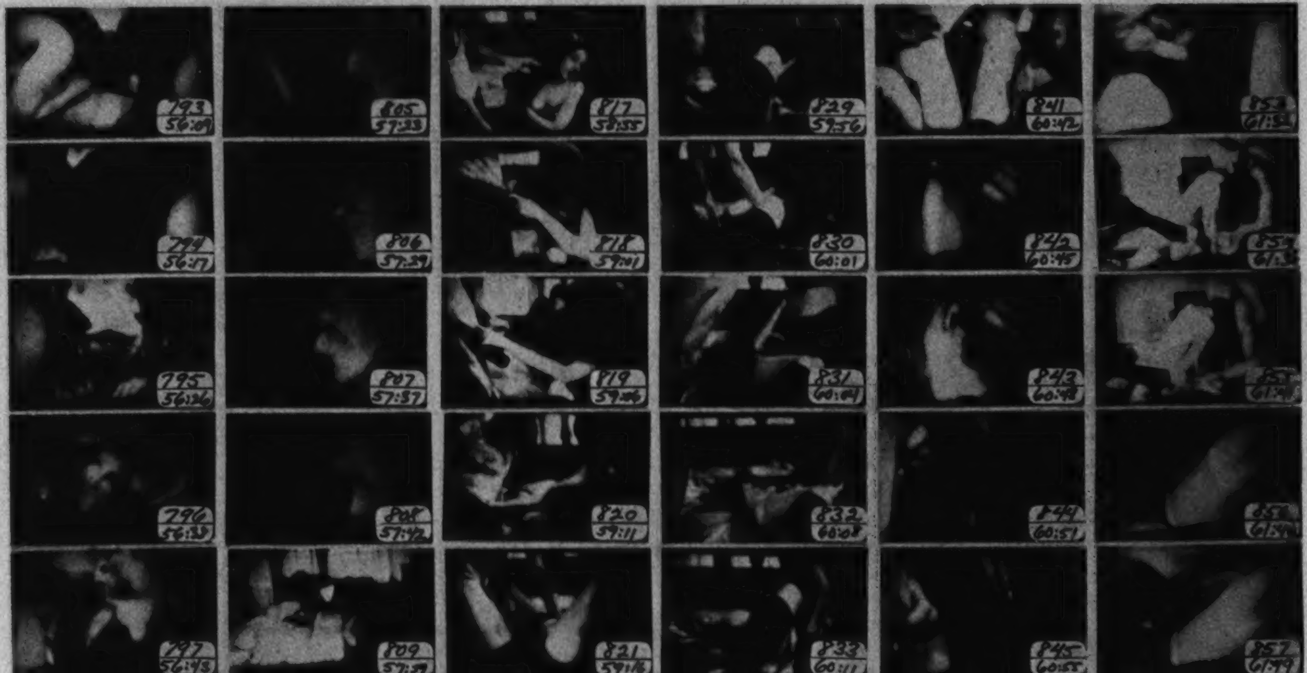
E-23

728 49:33
729 49:36
730 49:42
731 49:47
739 50:25
740 50:27
741 50:31
742 50:34
743 50:38
744
751 51:10
752 51:13
753 51:19
754 51:22
755 51:23
756
763 52:48
764 52:56
765 53:01
766 53:18
767 53:21
768 53:25
775 54:01
776 54:07
777 54:10
778 54:14
779 54:20
780
787 55:02
788 55:07
789 55:14
790 55:28
791
792 56:01

Lyn performs fellatio on Simon 721-726; Jesus awakes from trance 731-736; Lyn mounts Simon and engages him in sexual intercourse 737-754; Maggie performs fellatio 756-758; Simon has sexual intercourse with Maggie 761-786; Lyn performs fellatio on Jesus 788-792.

"STICKY SITUATION"
(Part 12 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.


793 56:09
805 57:23
817 58:55
829 59:56
841 60:42
853
794 56:17
806 57:29
818 59:01
830 60:01
842 60:45
854
795 56:26
807 57:37
819 59:06
831 60:04
843 60:48
855
796 56:33
808 57:42
820 59:11
832 60:08
844 60:51
856
797 56:43
809
821 59:16
833 60:11
845 60:55
857

800 56:55
812 58:13
824 59:35
836 60:25
848 61:10
860 62:03
801 57:02
813 58:20
825 59:40
837 60:28
849 61:14
861 62:07
802 57:08
814 58:27
826 59:43
838 60:30
850 61:18
862 62:10
803 57:15
815 58:35
827 59:46
839 60:33
851 61:25
863 62:16
804 57:18
816 58:50
828 59:50
840 60:38
852 61:28
864 62:21

Fellatio 793-808; Female makes up bed 809-812; Lyn engages Jesus and Paul in intercourse 813-824; Fellatio on Jesus 825-828; Fellatio on Jesus and Paul simultaneously 835-861.

"STICKY SITUATION"
(Part 13 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

865 62:26
877 63:49
889 64:26
901 65:12
913 65:56
925 66:53
866 62:30
878 63:54
890 64:31
902 65:14
914 66:01
926 66:58
867 62:55
879 63:58
891 64:36
903 65:18
915 66:04
927 67:02
868 62:59
880 64:01
892 64:38
904 65:20
916 66:08
928 67:05
869
881
893 64:41
905 65:24
917 66:13
929 67:10

871
883
895
907
919
931
872
884
896
908
920
932
873
885
897
909
921
933
874
886
898
910
922
934
875
887
899
911
923
935
876
888
900
912
924
936

Multiple sex (orgy) 865-875; Fellatio 876-883; Intercourse by male standing 884-890; Masturbation of Penis 891-892; group sex 893-899; Masturbation using wine bottle in vagina 900-916; Cunnilingus 917-925; Masturbation using wine bottle in vagina 926-936.

"STICKY SITUATION"
(Part 14 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

937 67:56
938 67:59
939 67:42
940 67:49
941 67:52
949 68:22
950 68:25
951 68:32
952 68:35
953 68:38
961 69:09
962 69:12
963 69:15
964 69:18
965 69:20
973 69:52
974 69:56
975 69:59
976 70:04
977 70:09
985 70:39
986 70:45
987 70:50
988 70:59
989 71:03
997 71:53
998 71:58
999 72:04
1000 72:1
1001 72:1

944
68:02
945
68:06
946
68:10
947
68:14
948
68:17
956
68:48
957
68:51
958
68:54
959
68:59
960
69:04
967
69:26
968
69:29
969
69:31
970
971
69:40
972
69:44
979
70:14
980
70:18
981
70:21
982
70:25
983
70:30
984
70:35
991
71:25
992
993
71:29
994
71:37
995
71:41
996
71:44
1003
72:26
1004
1005
72:34
1006
1007
72:41
1008
72:44

Masturbation using wine bottle in vagina 937-946; Cunnilingus 947-959; Fellatio 968-974; Maggie enters room to change bed clothes and finds Jesus in bed 975-979; Sexual intercourse between Jesus and Maggie 980-998; Fellatio 999-1008.

"STICKY SITUATION"
(Part 15 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

1009
72:47
1010
72:50
1011
72:53
1012
72:57
1015
73:12
1016
73:17
1017
73:20
1018
73:23

Paul has orgasm 1009-1012; Mary, Paul, Lyn, Maggie and Jesus face camera 1016-1017. The End 1018-1019.

[illegible]

[illegible]

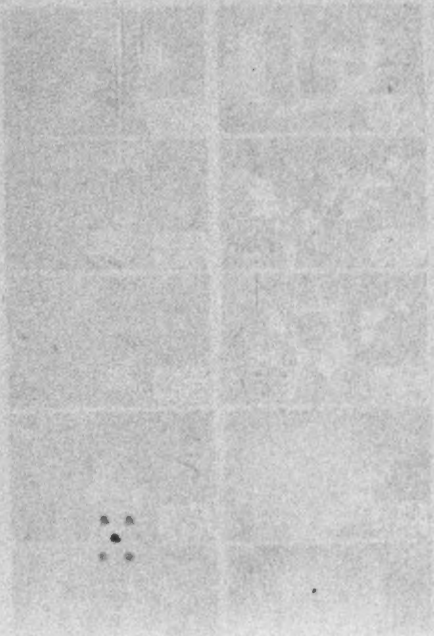
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]



[illegible]

APPENDIX F

TIME-MOTION STUDY* OF FILM "ADULTERY FOR FUN & PROFIT **

F-1 thru F-26

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at The Monroe Theatre, Rochester, N.Y. in March 1972. See Footnote 10.

"ADULTERY FOR FUN AND PROFIT"
(Part 1 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

GRAND PRIZE WINNER
AMSTERDAM
FILM FESTIVAL AWARD
DULTERY
FUN & PROF
DULTERY
FOR
FUN & PROF
DULTERY
FOR

F-3

Credits 1-6; Richard embraces Janet in auto 7-14; Janet discusses forthcoming divorce from her husband David and expected money settlement. She worries that a private detective might learn of their activities and she would be cut off without a cent 15-28. They strip and engage in sexual intercourse 29-42. Janet performs fellatio on Richard 43-84.

F-4

"ADULTERY FOR FUN AND PROFIT"
(Part 2 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y., in March 1972. See footnote 10.

F-5

Sexual intercourse between Richard and Janet, Janet on top 85-103; Sexual intercourse, Richard on top 104-153; Photographer takes a surveillance picture of the sex act 154-158; Richard discusses his services with client. He seduces client's wives, photographs of sexual misconduct are used by husband to extort low money settlement, Richard gets 10%. Client says: "Now that Janet knows we've got the pictures, she's agreed to settle everything quietly – out of court." 159-168.

"ADULTERY FOR FUN AND PROFIT"
(Part 3 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

F-7

Richard and client discuss Richard's next client 169-176 and ruse employed. Husband gets wife's purse and gives it to Richard. He phones and tells her he found it. "She comes over and we hit it off." Out of eight, he has "scored on seven of them." Next victim, Mrs. Walters arrives 177-182; He hands purse to her 183-186; After drink 187-190, they engage in intercourse 191-204; Richard performs cunnilingus 205-214; Sexual intercourse, Richard on top 215-247; Simone asks her lawyer what would happen to her settlement if she had an affair before the divorce; Lawyer: "that'd be adultery." 248-252.

"ADULTERY FOR FUN AND PROFIT"
(Part 4 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Simone tells her lawyer of the "lost purse" incident.253-256; Female 3 tells same lawyer a similar story – lost purse – affair – photographs. Lawyer says he would like to talk to Richard 257-261; Richard seduces another client's wife 263-275; Removes her clothing 277-288; Richard performs cunnilingus on female 289-335; Lawyer shows Richard picture he forced from Richard's photographer 336.

"ADULTERY FOR FUN AND PROFIT"
(Part 5 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Attorney tells Richard it is no coincidence when it happens to two of his clients. Attorney advises Richard he specializes in divorce cases "Are you reading me?" 337-340; Richard and blonde female engage in sexual intercourse 341-343; Female performs fellatio on Richard 344-420.

F-12

"ADULTERY FOR FUN AND PROFIT"

(Part 6 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Richard and Sylvia engage in sexual intercourse, Sylvia on top 422-499; closeup on penis and vagina 425-462; closeup on female's face registering passion 466-487; Female changes position and masturbates penis 501-503; and performs fellatio 504.

"ADULTERY FOR FUN AND PROFIT"
(Part 7 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Sylvia masturbates and performs fellatio on Richard 505-544; Photographer takes a surveillance picture of the sex act 545-546; Richard discusses next event – "Two chicks" 547-554; Sexual intercourse involving two couples 555-588.

"ADULTERY FOR FUN AND PROFIT"
(Part 8 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Intercourse between two males and two females; Female performs fellatio on Richard in shower 597-615; Intercourse between two couples standing in shower 615-626; Second female performs fellatio on second male 627-631; Both females perform fellatio on males standing in shower 632-659; Sexual intercourse on bed 660-663; Female performs fellatio on Richard on bed 664-672.

F-18

"ADULTERY FOR FUN AND PROFIT"
(Part 9 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Brunette performs fellatio on Richard on bed 673-680; Blonde performs fellatio on Richard standing 681-697; Richard sits on side of tub and lifts female onto his penis for intercourse, facing him 698-726; Other female sits on male and performs intercourse with her back to him 727-745; Both couples change positions and engage in intercourse with girls on top facing males 746-756.

F-20

"ADULTERY FOR FUN AND PROFIT"
(Part 10 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Two couples in intercourse 757-770; Male penis masturbated against female buttocks and anal area 771-783; Sexual intercourse, males on top 784-792; Female positions herself on hands and knees. Male performs intercourse from rear 793-804; Females faces register sexual reaction 805-826; Intercourse from rear continues 827-840.

F-22

"ADULTERY FOR FUN AND PROFIT"
(Part 11 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Intercourse continues 841-846. Photographer takes surveillance photo of sex act 847-849; Richard and the attorney argue over what is to be done. The attorney sets up another client to meet with Richard at his place 851-859 Female enters and offers $2000.00 and 10% of her divorce settlement. She wants a photograph of her husband, Sidney, who is a "rich fag." She engages Richard in sexual intercourse and performs fellatio on him 911-924.

"ADULTERY FOR FUN AND PROFIT"
(Part 12 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

Fellatio, masturbation and sexual intercourse by female on Richard 925-957; Sidney arrives and engages Richard in homosexual act 958-963; Photographer takes surveillance photo of sex act 965; Richard is at his place 966-970. All of the female victims in the film reappear one by one. They tell Richard they are going to take him out of circulation. By keeping him busy at his pastime, he won't have enough time to take on new clients 971-1008.

"ADULTERY FOR FUN AND PROFIT"
(Part 13 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.

[illegible] victim selects one day of the week 1009-1026.

APPENDIX G

TIME-MOTION STUDY* OF FILM "SCHOOL GIRL"**

G-1 thru G-32

---

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at the Trans-Lux, Washington, D.C. during Sept.-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See Footnote 8.

"SCHOOL GIRL"
(Part 1 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

CHOOL GI
1 29
13 1:34
25 2:50
37 3:57
49 5:54
61 6:48
CHOOL G
2 31
14 1:41
26 2:57
38 4:04
50 6:01
62 6:50
DEBRA
3 33
15 1:46
27 3:01
39 4:13
51 6:08
63 6:56
SUSAN DAV
GEORGE ALLE
4 38
16 1:55
28 3:03
40 4:26
52 6:14
64 6:59
SUSAN DAV
GEORGE ALLE
5 42
17 2:03
29 3:07
41 4:35
53 6:18
65 7:05

7 53
Produced by R.L. MILLS
8 56
Directed by DAVID REB
9 1:03
10 1:09
11 1:15
12 1:21
19 2:19
20 2:22
21 2:29
22 2:31
23 2:33
24 2:42
31 3:12
32 3:17
33 3:27
34 3:32
35 3:40
36 3:54
43 4:46
44 4:52
45 5:05
46 5:18
47 5:29
48 5:35
55 6:24
56 6:28
57 6:32
58 6:36
59 6:40
60 6:45
67 7:15
68 7:23
69 7:30
70 7:38
71 7:42
72 7:46

Credits 1-9; Debra, age 19, sits in classroom 10; instructor gives the class an assignment. They are to do a term paper on subcultures. Students are to do original research 10-36; class is dismissed 37-41; Debra has sexual relations with fellow student George 42-72.

"SCHOOL GIRL"
(Part 2 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

73 7:49
74 7:52
75 7:54
76 7:57
77 8:03
85 8:32
86
87 8:35
88 8:38
89 8:40
97 9:04
98 9:07
99 9:12
100 9:15
101 9:18
109 9:41
110 9:44
111 9:46
112 9:50
113 9:53
121 10:19
122 10:22
123 10:25
124 10:28
125 10:31
133 10:50
134 10:52
135 10:54
136 10:56
137

91
103
9:25
115
10:03
127
10:53
139
11:02
80
8:17
92
104
9:29
116
10:06
128
10:38
140
11:09
81
8:19
93
8:50
105
9:31
117
10:09
129
10:41
141
11:06
82
8:22
94
106
9:33
118
10:12
130
142
83
8:26
95
107
9:35
119
10:15
131
143
84
96
9:01
108
9:38
120
10:17
132
144

Sexual intercourse between Debra and George 73-82; Debra performs oral sodomy on George 83-93; George performs cunnilingus on Debra 98-103; simultaneous fellatio-cunnilingus 104-120; sexual intercourse with George on top of Debra 125-144.

"SCHOOL GIRL"
(Part 3 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

145 11:14
157 11:41
169 12:11
181 12:35
193 13:09
205
146 11:16
158 11:43
170 12:12
182
194 13:12
206 13:42
147 11:18
159 11:45
171 12:14
183 12:40
195 13:16
207 13:45
148 11:19
160 11:49
172 12:16
184 12:42
196 13:18
208 13:49

151 11:25
152 11:27
153 11:30
154 11:32
155 11:35
156 11:37
163 12:01
164 12:02
165 12:04
166 12:06
167 12:08
168 12:10
175 12:22
176 12:24
177 12:26
178 12:28
179 12:30
180 12:33
187 12:50
188 12:53
189 12:56
190 13:01
191 13:03
192 13:06
199 13:24
200 13:26
201 13:28
202 13:31
203 13:33
204 13:35
211 13:59
212 14:01
213 14:04
214 14:07
215 14:10
216

Sexual intercourse with George on top of Debra 145-161; sexual intercourse with Debra on top of George 162-216.

"SCHOOL GIRL"
(Part 4 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

217 14:16
218 14:20
219 14:23
220 14:27
221
229 15:04
230 15:06
231 15:09
232 15:11
233
241 15:38
242 15:41
243 15:45
244 15:47
245
253 16:11
254 16:21
255 16:28
256 16:25
257
265 16:55
266 16:57
267 16:59
268 17:01
269 17:03
277 17:30
278 17:40
279 17:51
280 18:05
281

223
235
15:17
247
15:57
259
16:31
271
17:07
283
19:05
224
14:44
236
15:20
248
16:01
260
16:34
272
17:09
284
19:09
225
14:49
237
15:24
249
16:04
261
16:36
273
17:11
285
19:13
226
14:52
238
15:27
250
16:08
262
274
17:14
286
19:20
227
14:56
239
15:31
251
16:11
263
275
17:17
287
228
15:01
240
252
16:14
264
276
288

Sexual intercourse with Debra on top of George 217-235; sexual intercourse with George on top of Debra 236-264; closeup of George sitting in front of Debra with erect penis 265-275; at conclusion of intercourse they discuss the term paper; Debra refuses to tell George what her topic is, "It's a secret." George gets angry 276-282. Debra gets dressed 283-288.

"SCHOOL GIRL"
(Part 5 of 16 Parts)

Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

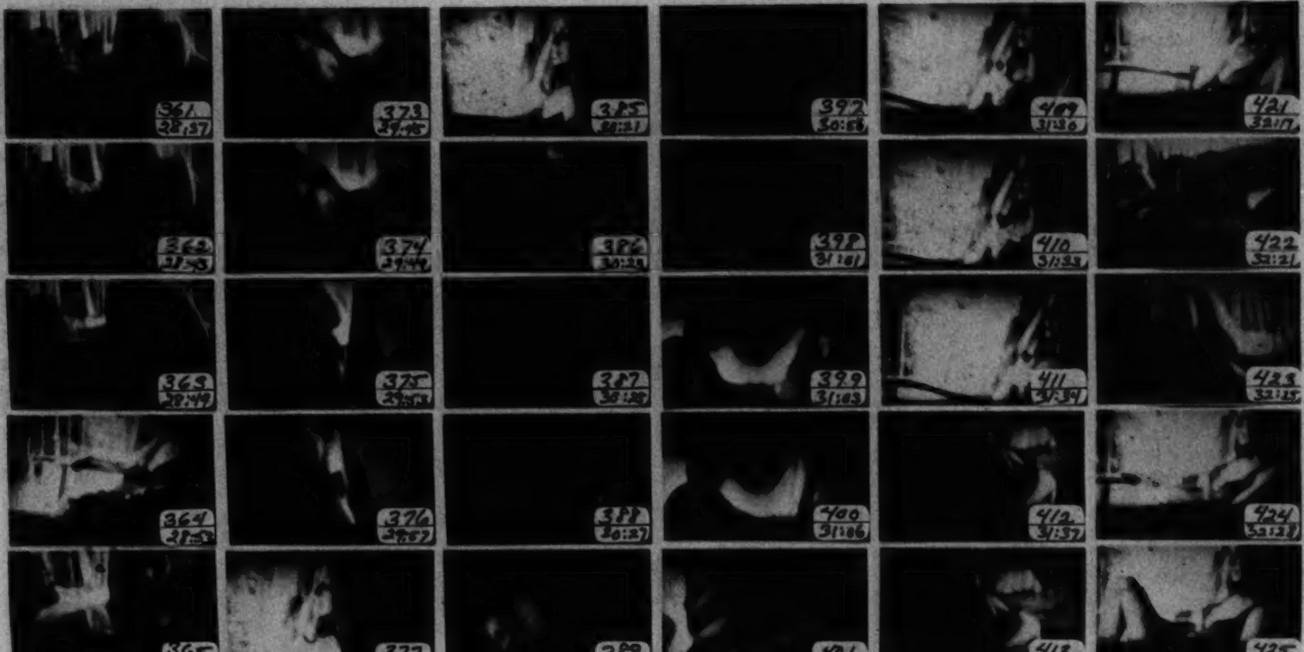
289 20:01
301 21:04
313 23:06
325 24:44
337 26:21
349
290 20:04
302 21:10
314
326 24:53
338
350
291 20:07
303 21:17
315 23:30
327 25:06
339
351
292 20:12
304 21:33
316 23:35
328 25:20
340
352 27:57
293
305
317
329
341
353

296
297
298
299
300
307
308
309
310
311
312
319
320
321
322
323
324
331
332
333
334
335
336
343
344
345
346
347
348
355
356
357
358
359
360

George is angry 289-293; they dress and leave 294-301; Debra meets her girl friend to discuss their day 301-305; Debra refuses to tell what her topic is 306-313; Debra looks at the ads in the "Barb" and phones 315-321; Debra discusses ad, "Couple – looking for young girl for instruction" and makes a date to meet on Friday after school 322-329; at residence of Elizabeth and Tony, Tony invites her in 330-331; Elizabeth tells what ad is about. Tony and Elizabeth have been married for 5 years but Tony has a penchant for young girls and she wants to keep him happy. There are two conditions, (1) she, Elizabeth, directs the sexual intercourse scenes and (2) Debra never sees her husband again. Elizabeth says that Debra is her present to her husband 332-348; Elizabeth directs Debra upstairs to the bedroom 349-354; Elizabeth sits in a chair and directs the sexual activity. She in-

"SCHOOL GIRL"
(Part 6 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.


361
373
385
392
409
421
362
374
386
398
410
422
363
375
387
399
411
423
364
376
388
400
412
424

Elizabeth instructs Debra 361-363; "Undo him," 364-365; following instructions, Debra takes his pants down 366-371; Elizabeth tells Debra to "give him head" 372; Debra performs oral sodomy under Elizabeth's direction 372-391; Elizabeth: "Suck his balls" 392; oral sodomy 400-413; Elizabeth tells Tony to take off his shirt and pants 414; fellatio 423-432.

"SCHOOL GIRL"
(Part 7 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

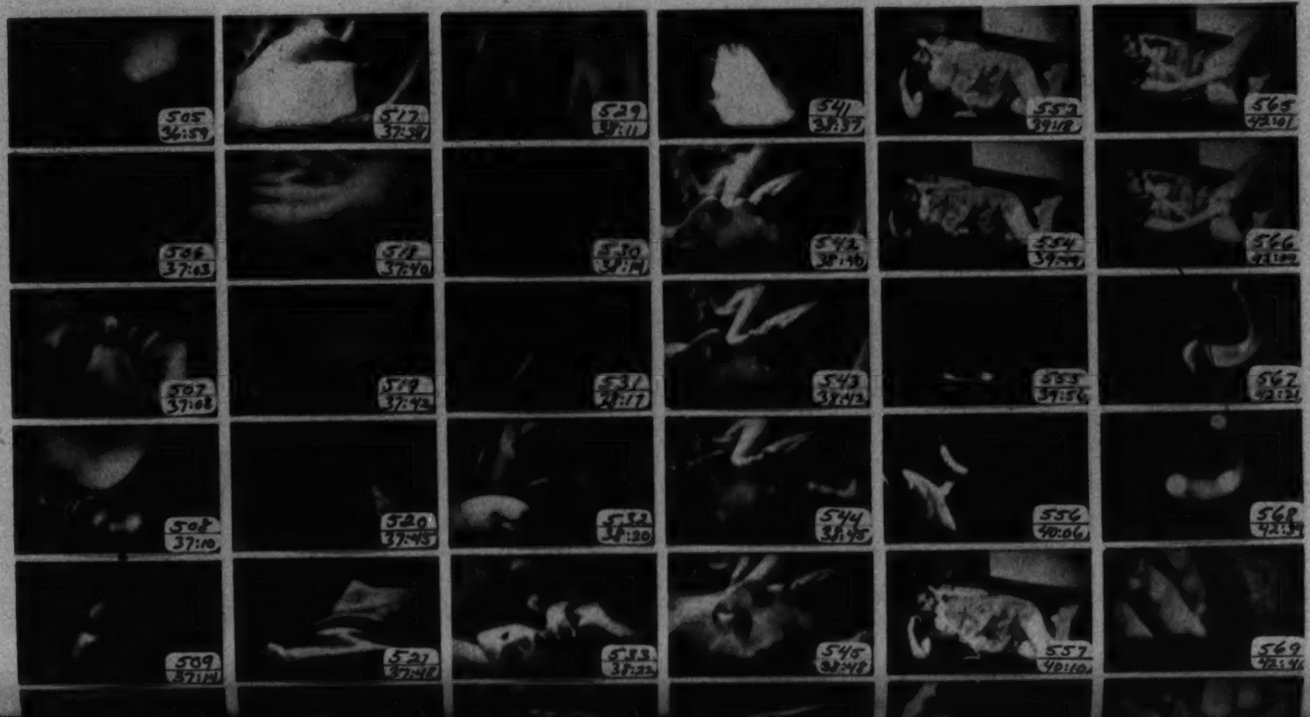
433 33:02
434 33:05
435 33:10
436 33:15
437 33:18
445 33:45
446 33:48
447 33:51
448 33:54
449 33:57
457 34:29
458 34:32
459 34:35
460 34:38
461 34:41
469 35:11
470 35:13
471 35:16
472 35:21
473 35:25
481 35:50
482 35:52
483 35:55
484 35:58
485 36:01
493 36:20
494 36:23
495 36:26
496 36:30
497 36:33

440
33:29
452
34:09
464
34:54
476
35:38
488
36:10
500
36:41
441
33:31
453
34:12
465
34:57
477
35:41
489
36:12
501
442
33:34
454
34:19
466
35:01
478
35:43
490
502
36:48
443
33:37
455
34:22
467
35:05
479
35:46
491
36:15
503
444
468
35:08
480
492
504

Elizabeth directs sexual activity of her husband with Debra 433-435; Debra performs oral sodomy on Tony 436-442; Debra mounts Tony 443-446; Elizabeth watches and becomes aroused 447-449; Elizabeth strips her clothing 450-453 and joins sexual activity 453-456; sexual intercourse with Tony above Debra 457-504; Elizabeth lies on the bed alongside and masturbates 466-476 as she watches intercourse.

"SCHOOL GIRL"
(Part 8 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.


505
506
507
508
509
517
518
519
520
521
529
530
531
532
533
541
542
543
544
545
553
554
555
556
557
565
566
567
568
569

Sexual intercourse, Tony on top 505-510; group sexual activity sodomy and cunnilingus on Debra 511-532; Debra performs oral sodomy on Tony 533-550; Debra makes a telephone call in response to the ad, "Are You the Girl Who Makes Obscene Phone Calls" 552-554; male voice at other end asks questions concerning what she's wearing 555-564 and instructs her to "Touch her cunt" 569-571 and "Put her finger in" 572.

"SCHOOL GIRL"
(Part 9 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

577
578
579
580
581
589
590
591
592
593
601
602
603
604
605
613
614
615
616
617
625
626
627
628
629
637
638
639
640
641

Obscene telephone conversation continues with both parties masturbating as they carry on lewd conversation 577-648.

"SCHOOL GIRL"
(Part 10 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

649 47:11
661
673 50:20
685 52:49
697 53:49
709 55:13
650 47:13
662
674 50:23
686
698 53:47
710 55:21
651
663
675 50:29
687 52:47
699 53:53
711
652 47:19
664
676 50:31
688
700 54:02
712 55:34
653
665
677 50:43
689 52:51
701 54:10
713 55:36

656
49:14
657
49:18
658
49:26
659
49:39
660
668
50:03
669
670
50:10
671
50:15
672
680
51:02
681
51:16
682
51:43
683
51:59
684
692
53:10
693
53:16
694
53:29
695
53:30
696
53:35
703
54:25
704
54:28
705
706
54:37
707
54:43
708
715
716
717
55:57
718
56:04
719
56:11
720

Obscene telephone caller masturbates penis 649-651; Debra phones in response to "Barb" Father and Son ad 653-654 and makes a date to be there in an hour. She picks up and looks at magazine in mailbox 655-673 and departs for date with father and son team 674. Father and son team discuss their activities with Debra, one is a shoe salesman and the other is a telephone lineman, they have been doing this for 3 years since the son got out of the army 677-683. Debra says it is the first time she has been with two men 684-689; they commence sexual activity 690-700; Debra's girl friend Susan looks at magazines 701-705; and lies on her bed reading them 706-

"SCHOOL GIRL"
(Part 11 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

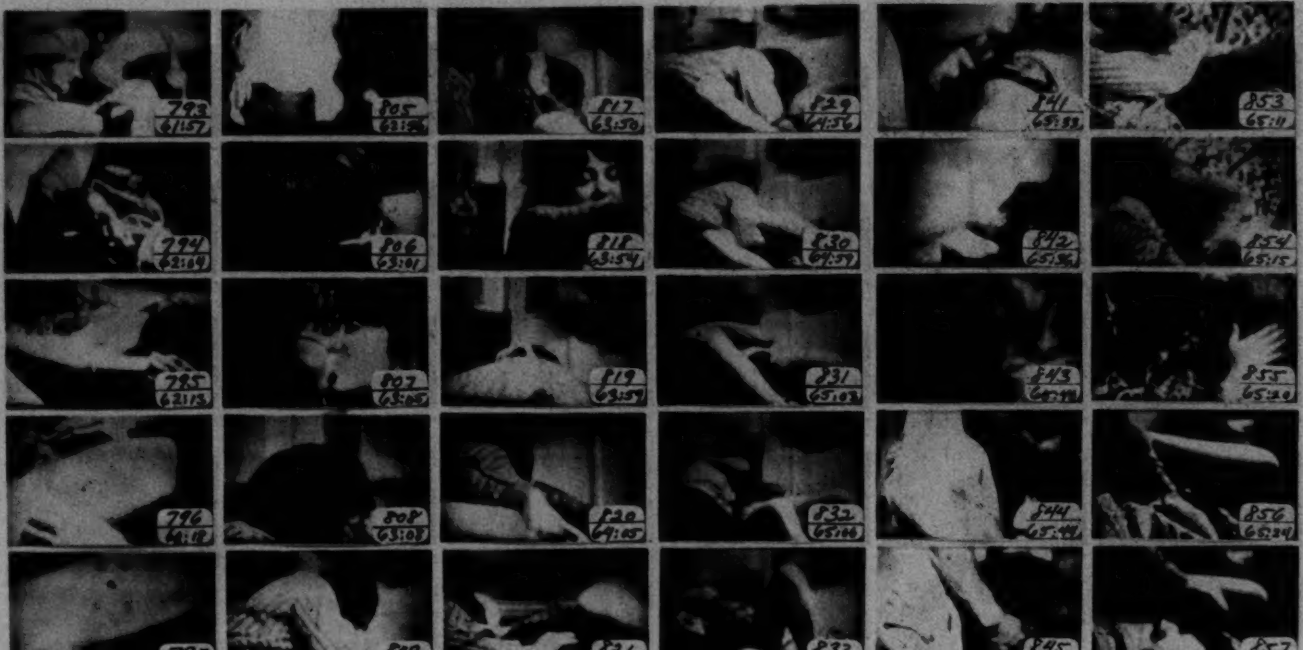
721
722
723
724
725
733
734
735
736
737
745
746
747
748
749
757
758
759
760
761
769
770
771
772
773
781
782
783
784
785

728 57:01
740 57:5
752 58:46
764 59:34
776 60:49
788
729 57:05
741 57:59
753 58:50
765 59:41
777 60:53
789 61:35
730 57:10
742 58:02
754 58:56
766 59:46
778 60:57
790 61:40
731
743 58:06
755 59:01
767 59:50
779 61:01
791 61:46
732 57:20
744 58:12
756
768
780 61:06
792 61:53

Susan reads magazines in her room 721-725 and becomes sexually aroused 726-744; while masturbating a knock is heard on the door 745-746 and she gets up to answer 747-748. Mr. Humphrey, the teacher, is calling to tell her he is worried about Debra and her project; while they discuss Debra's "innocence" the camera focuses on Debra in sexual relations with the father and his son 749-757, and Debra performing oral sodomy 758-760; Susan shows Mr. Humphrey some pornographic material Debra has received and they look at it together 761-776; camera shifts to sexual activity of Debra and father and son team 777-792.

"SCHOOL GIRL"
(Part 12 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.



793 61:57
805 63:5
817 63:50
829 64:56
841 65:33
853 65:11
794 62:04
806 63:01
818 63:54
830 64:59
842 65:36
854 65:15
795 62:13
807 63:05
819 63:57
831 65:03
843 65:40
855 65:20
796 64:18
808 63:08
820 64:05
832 65:06
844 65:44
856 65:24

800
801
802
803
809
811
812
813
814
815
816
823
824
825
826
827
828
835
836
837
838
839
840
847
848
849
850
851
852
859
860
861
862
863
864

Sexual activities of Debra and father and son team 793-805; Susan engages Mr. Humphrey in sexual activity 806-833; camera shifts to sexual activities of Debra and father and son team, Debra performs fellatio 834-836; while second member performs cunnilingus 838-843; Debra performs oral sodomy on male standing 844-846; group sexual activity 847-852; camera returns to Susan and Mr. Humphrey; Susan performs oral sodomy on Mr. Humphrey 860-864.

"SCHOOL GIRL"
(Part 13 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

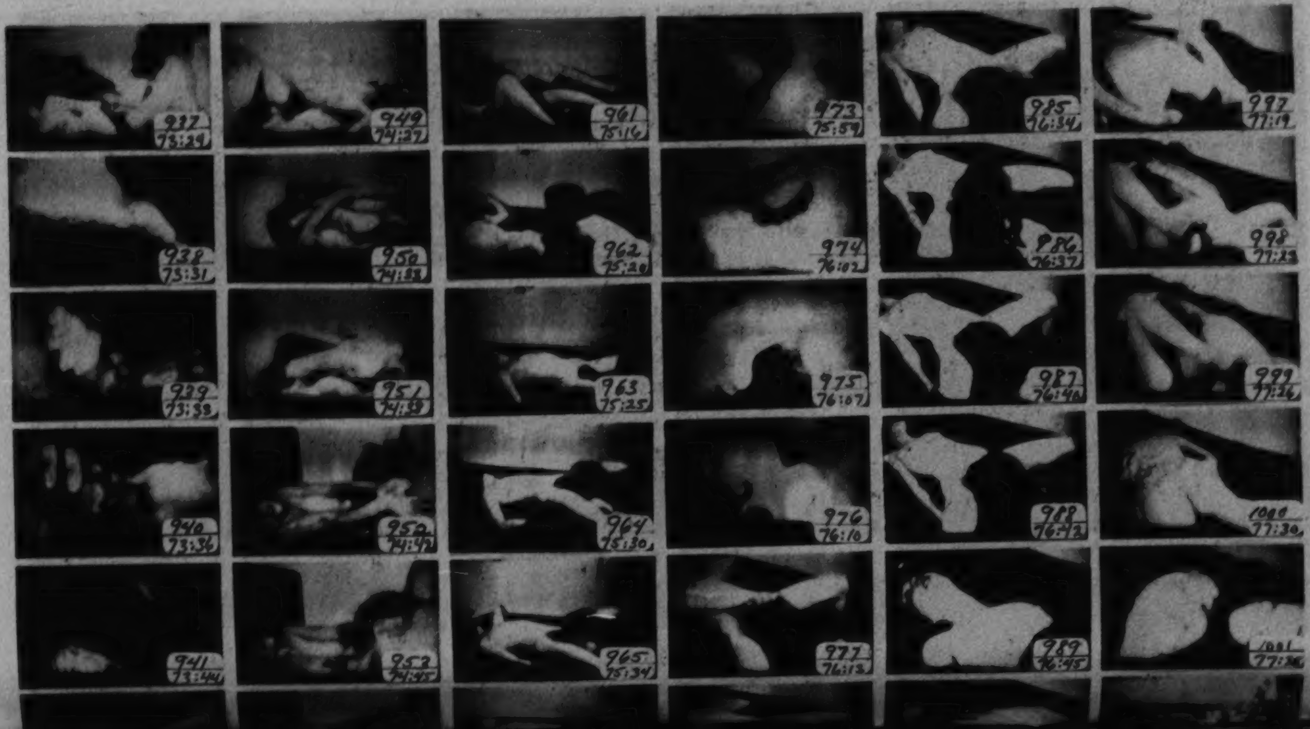
865 65:56
877 67:40
889 68:24
901 69:10
913 70:58
925 72:19
866 65:59
878 67:45
890 68:27
902 69:16
914 71:06
926 72:24
867 67:03
879 67:46
891 68:31
903 69:23
915 71:22
927 72:27
868 67:06
880 67:50
892 67:59
904 69:35
916 71:23
928 72:32
869
881 67:55
893
905
917 71:30
929

871 67:15
883 68:02
895 68:44
907 69:59
919 71:42
931 72:47
872 67:20
884 68:06
896 68:46
908 70:08
920 71:49
932 72:53
873 67:24
885 68:09
897 68:53
909 70:15
921 71:56
933 73:01
874 67:40
886 68:11
898 68:54
910 70:30
922 72:01
934 73:07
875 67:35
887 68:17
899 69:01
911 70:48
923 72:09
935 73:11
876 67:37
888 68:20
900 69:05
912 70:55
924 72:14
936 73:16

Debra performs oral sodomy 865-874; sexual intercourse between Susan and Mr. Humphrey 876-886; group sexual activity between Debra and the father son team 887-889; sexual activity between Mr. Humphrey and Susan 890-891; Sexual activity between Debra and father and son team 892-895; Mr. Humphrey leaves and asks Susan not to mention it to anyone in the class 896; Debra discusses her project with Susan, she tells her that she has had sexual activity with a husband and wife team and a father and son team 898-916; Debra kisses Susan 917-919; lesbian activity between Susan and Debra 920-936.

"SCHOOL GIRL"
(Part 14 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.


937 73:29
938 73:31
939 73:33
940 73:36
941 73:44
949 74:27
950 74:33
951 74:39
952 74:42
953 74:45
961 75:16
962 75:20
963 75:25
964 75:30
965 75:34
973 75:59
974 76:02
975 76:07
976 76:10
977 76:13
985 76:34
986 76:37
987 76:40
988 76:42
989 76:45
997 77:19
998 77:23
999 77:26
1000 77:30
1001 77:3

943
955
967
979
991
1003
944
956
968
980
992
1004
945
957
969
981
993
1005
946
958
970
982
994
1006
947
959
971
983
995
1007
948
960
972
984
996
1008

Lesbian activity between Debra and Susan 937-949; cunnilingus 950-955; lesbian activity 956-960; cunnilingus 961-990; lesbian activity 991-1000; Debra and Susan lie side by side 1001; Debra tells Susan she has been invited to an orgy party; they decide to go together; Debra and Susan arrive at the orgy party 1002-1008.

"SCHOOL GIRL"
(Part 15 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

1009 79:15
1021 80:48
1033 81:59
1045 83:12
1057 83:53
1069 84:29
1010 79:20
1022 80:56
1034 82:04
1046 83:17
1058 83:55
1070 84:32
1011 79:29
1023 81:03
1035 82:08
1047 83:21
1059 83:58
1071 84:34
1012 79:37
1024 81:10
1036 82:14
1048 83:23
1060 84:01
1072 84:38
1013 79:49
1025 81:19
1037 82:17
1049 83:27
1061 84:04
1073 84:41

1016
80:16
1028
81:39
1040
82:37
1052
83:33
1064
84:13
1076
84:50
1017
80:24
1029
81:44
1041
82:43
1053
83:43
1065
84:17
1077
84:51
1018
80:30
1030
81:48
1042
82:49
1054
83:45
1066
84:20
1078
84:54
1019
80:37
1031
81:51
1043
82:57
1055
83:48
1067
84:23
1079
85:01
1020
80:43
1032
81:55
1044
83:04
1056
83:51
1068
84:26
1080

Debra and Susan attend and engage in sexual activity at orgy party 1009-1080.

"SCHOOL GIRL"
(Part 16 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

1081
1082
1083
1084
1085
1087
1088
1089
1090
1091
1093
1094
1095
1096
1097
1099
1100
1101
1102
1103
1104
1106
1107
1108
1109
THE END

Sex orgy party 1081-1096; classroom, Mr. Humphrey, the teacher, calls on Debra to give he
Debra tells the class she has explored the sexual subculture, has looked at advertisements
paper and explored the principals and their motives, purely from an academic interest, be
that they hate what they're doing and they have a chronic search for sexual fulfillment whi
to find 1100-1108. The End 1109.

APPENDIX H

TIME-MOTION STUDY[*] OF FILM "MAGIC MIRROR"[**]

H-1 thru H-37

---

[*] A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

[**] Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 G.A. 343, 185 S.E.2d 768 (Nov. 5, 1971) Cert. granted in 33 L.Ed.2d 331 (June 26, 1972).

"MAGIC MIRROR"
(Part 1 of 18 Parts)

held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

THE MAGIC MIRROR
1 :00
2 :09
3 1:00
11 1:42
12 1:47
13 1:55
21 2:45
22 2:51
23 2:57
31 3:40
32 3:49
33 3:55
41 4:29
42 4:35
43 4:37
51
52
53

7 1:20
8 1:27
9 1:34
10 1:38
16 2:10
17 2:15
18 2:21
19 2:25
20 2:29
26 3:15
27 3:20
28 3:24
29 3:27
36 4:10
37 4:18
38 4:19
39 4:24
40 4:27
46 4:49
47 4:52
48 4:57
49 5:08
56 5:47
57 5:50
58 5:54
59 5:57
60 5:57

Credits 1-2; female 1 browsing in antique store, purchases mirror 3-34; female 1 in her apartment 35-38; TV man arrives to do repair 39-55; female 1 enters her bedroom for purse and glances at mirror 56-60

held to be hard core pornography and a public
nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

"MAGIC MIRROR"
(Part 2 of 18 Parts)

61
71
81
91
101
111
62
72
82
92
102
112
63
73
83
93
103
113
64
74
84
94
104
114

106
116
67
77
87
97
107
117
68
78
88
98
108
118
69
79
89
99
109
119
70
80
90
100
110
120

Fade to scene, female 1 and TV man, standing nude lathering each other with shave cream 61-72; female 1 and TV man lather each other, genitals and breasts 73-111; they fall to the floor and engage in sexual intercourse, female on top 113-120.

"MAGIC MIRROR"
(Part 3 of 18 Parts)

nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

121
122
123
124
131
132
133
134
141
142
143
144
151
152
153
154
161
162
163
164
171
172
173
174

126
136
146
156
166
176
127
137
147
157
167
177
128
138
148
158
168
178
129
139
149
159
169
179
130
140
150
160
170
180

Sexual intercourse, female on top 121-136; female slides back and forth over male's body 137-170; sexual intercourse, woman on top 172-180.

"MAGIC MIRROR"
(Part 4 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

181
191
11:31
201
211
12:21
221
231
182
11:01
192
11:55
202
212
12:29
222
232
183
193
203
213
223
233

187
197
207
217
227
188
198
208
218
228
238
189
199
209
219
229
239
190
200
210
220
230
240

Sexual intercourse, female on top 181-194; sexual intercourse, male on top 195-240.

"MAGIC MIRROR"
(Part 5 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

241 13:32
242 13:35
243 13:38
244 13:40
251 14:01
252 14:05
253 14:08
254 14:13
261 14:31
262 14:34
263 14:36
264 14:39
271 14:56
272 14:59
273 15:01
274 15:03
281 15:26
282 15:30
283 15:35
284 15:40
291 15:56
292 15:59
293 16:02
294 16:07

247
13:47
257
14:22
267
14:43
277
15:14
287
15:47
297
16:15
248
13:49
258
14:25
268
14:45
278
15:16
288
15:49
298
16:18
249
13:52
259
14:27
269
14:47
279
15:18
289
15:51
299
16:22
250
13:56
260
14:29
270
14:52
280
15:22
290
15:54
300
16:25

Sexual intercourse male on top 241-254; they grapple and roll over each other 254-276; sexual intercourse, woman on top 277-293; sexual intercourse, man on top 294-300.

"MAGIC MIRROR"
(Part 6 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

301
311
321
331
341
351
302
312
322
332
342
352
303
313
323
333
343
353
304
314
324
334
344
354

307
317
327
337
347
357
308
318
328
338
348
358
309
319
329
339
349
359
310
320
330
340
350
360

Simultaneous fellatio and cunnilingus 301-319; fade out to scene, female 1 pays TV man 322-329; scene shifts to female reading as doorbell rings 331-332; female 2 and female 1 of anti-smut society enter 333-353; look at mirror 354-360.

"MAGIC MIRROR"
(Part 7 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

361
371
20:30
381
21:01
391
21:30
401
22:01
411
362
20:18
372
20:31
382
21:05
392
21:33
402
22:04
412
363
20:15
373
20:32
383
393
21:37
403
22:07
413
394
404
414

366
376
386
396
406
416
367
377
387
397
407
417
368
378
388
398
408
418
369
379
389
399
409
419
370
380
390
400
410
420

Fade to female 2 and 3 nude 361-364; lesbian activity 364-382; female on top rubbing genitals 383-399; lesbian activity 400-408; cunnilingus 409-415; females fondle each other's breasts 416-420.

"MAGIC MIRROR"
(Part 8 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

421
431
441
451
461
471
422
432
442
452
462
472
423
433
443
453
463
473
424
434
444
454
464
474

H-17

426
436
446
456
466
476
427
437
447
457
467
477
428
438
448
458
468
478
429
439
449
459
469
479
430
440
450
460
470
480

Females fondle each others breasts 421-432; focus on anus 433-440; cunnilingus 441-453; simultaneous cunnilingus 454-480.

"MAGIC MIRROR"
(Part 9 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

H-18

Simultaneous cunnilingus 481-493; reverse positions in simultaneous cunnilingus 494-512; rubbing of genitals 512-527; cunnilingus 528-540.

"MAGIC MIRROR"
(Part 10 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

541
551
561
571
581
591
542
552
562
572
582
592
543
553
563
573
583
593
544
554
564
574
584
594

556
29:36
566
30:04
586
31:12
596
31:41
547
29:09
557
29:39
567
30:08
577
30:40
587
31:15
597
31:43
548
29:12
558
29:41
568
30:10
578
30:43
588
31:18
549
29:15
559
29:44
569
30:13
579
30:50
589
31:21
599
31:50
550
29:19
560
29:46
570
30:15
580
30:54
590
31:25
600
31:53

Cunnilingus 541-558; lesbian activity 558-583; rubbing of genitals 584-600.

"MAGIC MIRROR"
(Part 11 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov.5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)

601 31:56
611 32:34
621 33:11
631
641
651
602 31:59
612 32:40
622 33:14
632 33:57
642 35:02
652
603 32:03
613 32:45
623 33:16
633 34:01
643 35:08
653
604 32:10
614 32:49
624 33:20
634 34:04
644 35:14
654 36:01

616
626
636
34:09
646
35:23
656
607
32:21
617
32:59
627
637
34:13
647
657
36:11
608
618
33:02
628
33:42
638
34:18
648
35:35
658
36:15
609
32:27
619
33:04
629
33:46
639
649
659
36:21
610
32:30
620
33:07
630
640
650
660
36:25

Rubbing of genitals 601-636; fade out as females 2 and 3 leave 636-640; scene shifts to bedroom, female 1 and man in full dress are dancing 641-658; both look at mirror and fade out to next activity 658-660.

"MAGIC MIRROR"
(Part 12 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

661
671
681
691
701 40:39
710 41:12
662 36:35
672 37:20
682
692 39:51
702
663
673 37:24
683
693
703
664 36:45
674 37:29
684
694 39:57
704
714

667
36:57
677
37:47
687
39:52
697
40:08
707
40:57
717
41:5
668
37:01
678
37:56
688
39:57
698
40:13
708
41:02
718
42:07
669
37:06
679
38:02
689
39:42
699
40:16
709
41:07
719
42:10
670
37:11
680
38:08
690
700
711
720
42:16

Two nude males and two nude females are dancing 661-678; cunnilingus 678-679; fellatio 680-682; sexual embrace 682-690; cunnilingus 691-701; sexual intercourse woman on top, 702-707; sexual activity 708-720.

"MAGIC MIRROR"
(Part 13 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

721 42:30
731 43:03
741 43:48
752 44:07
761 45:2
771 46:22
722 42:3
732 43:06
742 43:45
753 44:10
762 45:25
772 46:2
723 42:2
733 43:11
743 43:47
754 44:14
763 45:32
773 46:3
724 42:32
734 43:17
744 43:49
751 44:04
764 45:40
774 46:35

726 42:40
727 42:45
728 42:49
729 42:54
730 42:58
736 43:27
737 43:31
738 43:35
739 43:39
740 43:40
746 43:51
747 43:53
748 43:56
749 43:58
750 44:01
756 44:32
757 45:04
758 45:01
759 45:11
760 45:16
766 45:50
767 45:56
768 46:04
769 46:07
770 46:18
776 46:46
777 46:49
778 46:53
779 46:57
780 47:01

Cunnilingus 721-223; sexual intercourse 724-731; cunnilingus 733; sexual intercourse, male on top 737-750; sexual intercourse, woman on top 751-756; group sex 756-780.

"MAGIC MIRROR"
(Part 14 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)

786 47:26
796 47:54
806 48:34
816 49:10
826 49:49
836 50:22
787 47:30
797 48:03
807 48:39
817 49:18
827 49:52
837 50:25
788 47:57
798 48:06
808 48:43
818 49:19
828 49:55
838 50:27
789 47:59
799 48:11
809 48:45
819 49:21
829 49:58
839 50:39
790 47:41
800 48:14
810 48:44
820 49:24
830 50:02
840 52:50

Group sex 781-792; sexual intercourse, male on top 793-833; sexual intercourse, woman on top 834; group sex 834-840.

"MAGIC MIRROR"
(Part 15 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

Group sex 841-853; fade to scene in apartment, male and female leave apartment dressed in formal attire 854-861; scene shifts to female 1 asleep in bed 862-864; burglar enters and rifles her purse 865-869; female awakens and burglar, using gun, forces her to lie down as he binds her hands 872-880; policeman enters and holds gun on burglar 881-887; female looks at mirror 888-889; fade to robber and policemen nude, fondling female 1, 889-900.

"MAGIC MIRROR"
(Part 16 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

H-32

901 55:26
911 55:58
921 56:36
931 57:10
941 57:52
951 58:41
902 55:29
912 56:01
922 56:39
932 57:14
942 57:58
952 58:49
903 55:31
913 56:05
923 56:43
933 57:19
943 58:02
953 58:49
904 55:34
914 56:09
924 56:46
934 57:23
944 58:06
954 58:55

907
55:43
917
56:21
927
56:56
937
57:34
947
58:25
957
59:08
908
55:47
918
56:24
928
56:59
938
57:42
948
58:29
958
59:11
909
55:51
919
56:29
929
57:03
939
57:46
949
58:32
959
59:15
910
55:55
920
930
57:06
940
57:44
950
58:36
960
59:18

Group sexual activity 901-931; robber knocks policeman out 931-933; sexual intercourse between female 1 and burglar 934-940; female on top 940-943; cunnilingus 944; sexual intercourse, woman on bottom 948-956; sexual intercourse, woman on top 958-960.

"MAGIC MIRROR"
(Part 17 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

961 59:24
971 60:12
981 60:47
991 61:18
1001 61:57
1011 62:41
962 59:30
972 60:16
982 60:47
992 61:21
1002 62:03
1012 62:44
963 59:34
973 60:19
983 60:53
993 61:24
1003 62:08
1013 62:49
964 59:39
974 60:23
984 60:57
994 61:27
1004 62:12
1014 62:53

966 59:51
976 60:29
986 61:01
996 61:39
1006 62:20
1016 63:02
967 59:55
977 60:33
987 61:05
997 61:38
1007 62:24
1017 63:07
968 59:59
978 60:36
988 61:11
998 61:43
1008 62:28
1018 63:10
969 60:05
979 60:40
989 61:14
999 61:46
1009 62:33
1019 63:16
970 60:08
980 60:45
990 61:16
1000 61:51
1010 62:37
1020 63:20

Sexual intercourse, woman on top 961-965; sexual intercourse, man on top 966-976; sexual intercourse, lying on unconscious policeman 980-984; officer awakens 984-987; group sexual activity 987-1020.

"MAGIC MIRROR"
(Part 18 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

1021 63:24
1031 64:04
1041 64:35
1051 65:11
1061 65:51
1071 66:21
1022 63:29
1032 64:07
1042 64:39
1052 65:14
1062 65:52
1072 66:25
1023 63:33
1033 64:09
1043 64:42
1053 65:24
1063 65:54
1073 66:28
1024 63:37
1034 64:11
1044 64:45
1054 65:31
1064 65:55
1074 66:32

1026 63:47
1036 64:17
1046 64:52
1056 65:40
1066 65:59
1076 66:41
1027 63:50
1037 64:19
1047 64:56
1057 65:43
1067 66:04
1077 66:46
1028 63:52
1038 64:23
1048 64:59
1058 65:47
1068 66:09
1078 66:49
1029 63:55
1039 64:27
1049 65:03
1059 65:44
1069 66:13
THE END
1079 66:57
1030 63:59
1040 64:31
1050 65:06
1060 65:50
1070 66:17

Group sexual intercourse 1021-1032; sexual intercourse, woman on top 1049; female performs fellatio on each; policeman licks her toes 1064; scene changes back to room; police officer shoots burglar who falls to floor 1064; policeman leaves to make report; female reads note.

APPENDIX I

TIME-MOTION STUDY* OF FILM "IT ALL COMES OUT IN THE END" **

I-1 thru I-24

---

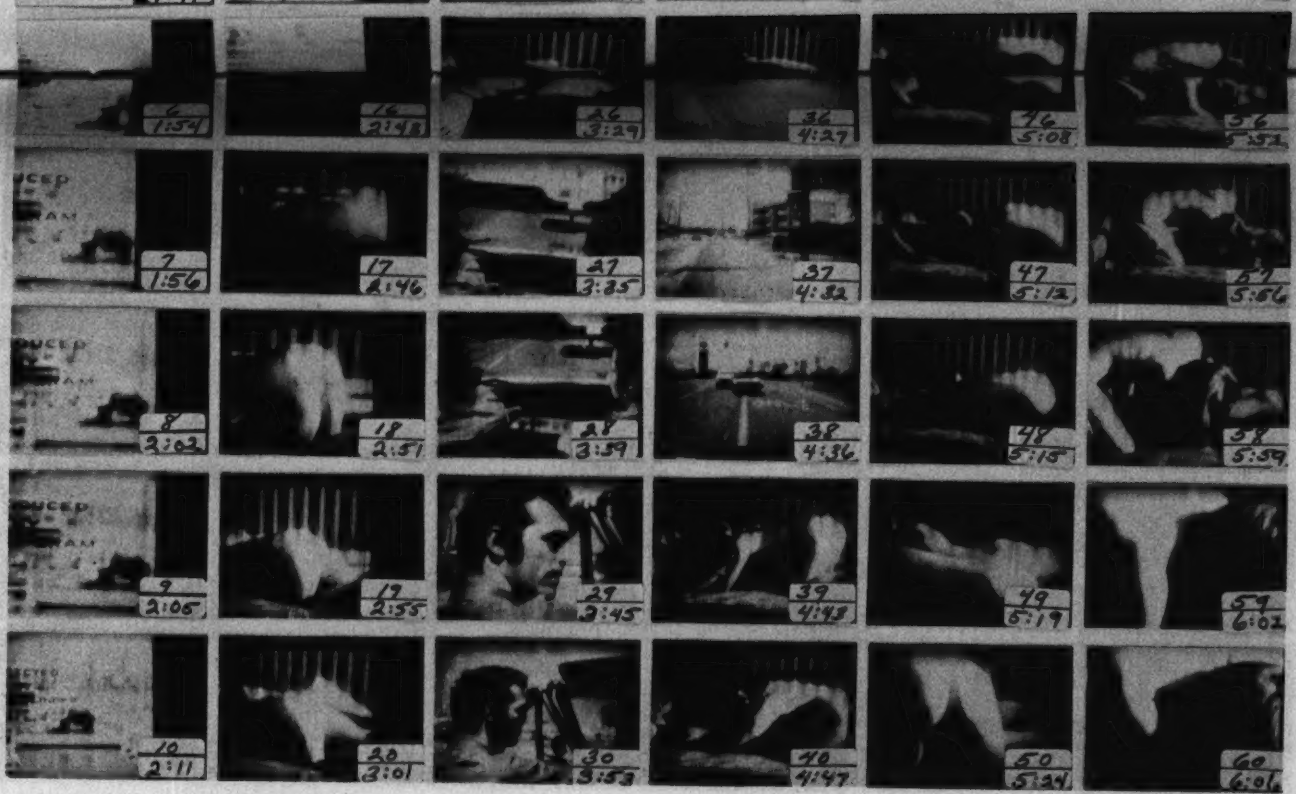
*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

** Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 S.E.2d 768(Nov. 5, 1971) Cert. granted in 33 L.Ed.2d 331 (June 26, 1972).

"IT ALL COMES OUT IN THE END"
(Part 1 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

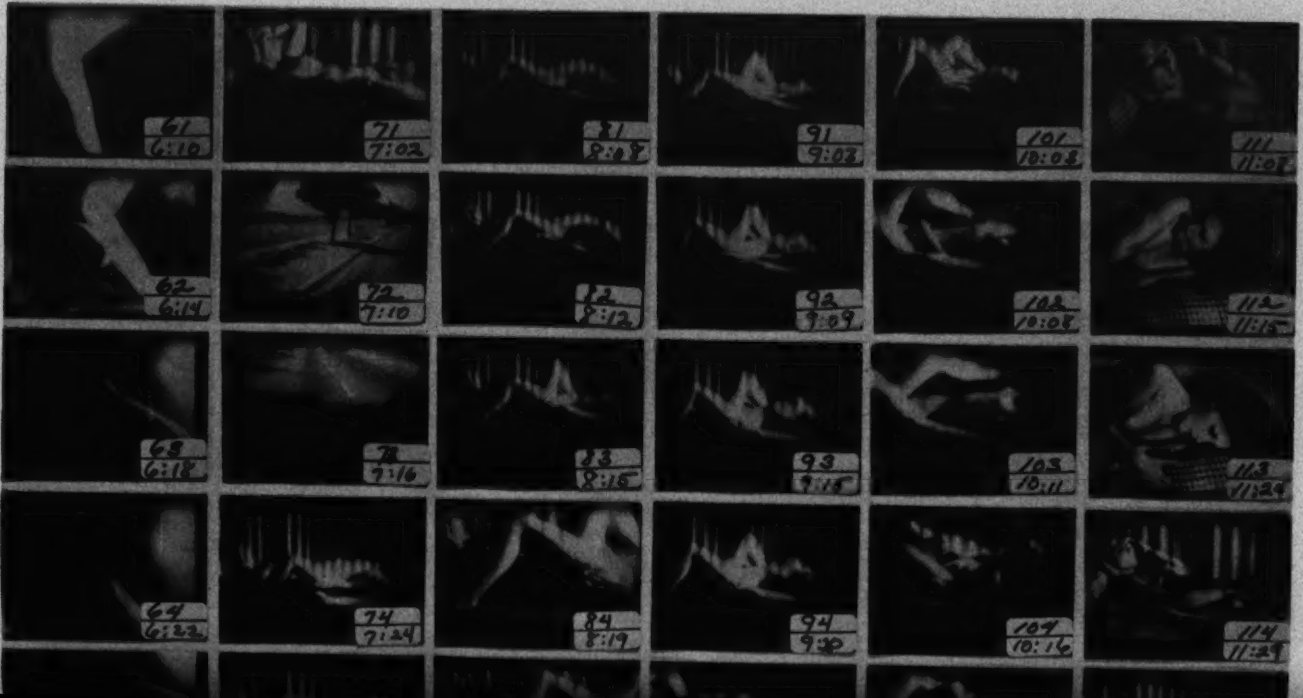
1 1:39
11 2:17
21 3:05
31 4:01
41 4:50
51 5:27
2 1:42
12 2:21
22 3:15
32 4:07
42 4:55
52 5:32
3 1:46
13 2:26
23 3:18
33 4:13
43 4:57
53 5:35
4
14
24
34
44
54


6
1:54
16
2:48
26
3:29
36
4:27
46
5:08
56
5:52
7
1:56
17
2:46
27
3:35
37
4:32
47
5:12
57
5:56
8
2:02
18
2:51
28
3:39
38
4:36
48
5:15
58
5:59
9
2:05
19
2:55
29
3:45
39
4:43
49
5:19
59
6:02
10
2:11
20
3:01
30
3:53
40
4:47
50
5:24
60
6:01

Credits 1-15; females 1 and 2 in lesbian activity 16-21; males 1 and 2 riding in auto 22; lesbian activity 23-26; males in auto 27-31; lesbian activity 32-35; males in auto 36-38; cunnilingus 39-49; double cunnilingus 50-60.

"IT ALL COMES OUT IN THE END"
(Part 2 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)


61 6:10
71 7:02
81
91 9:03
101 10:08
111
62 6:14
72 7:10
82 8:12
92 9:09
102 10:08
112 11:15
63 6:18
73 7:16
83 8:15
93
103 10:11
113
64 6:22
74 7:24
84 8:19
94
104 10:16
114

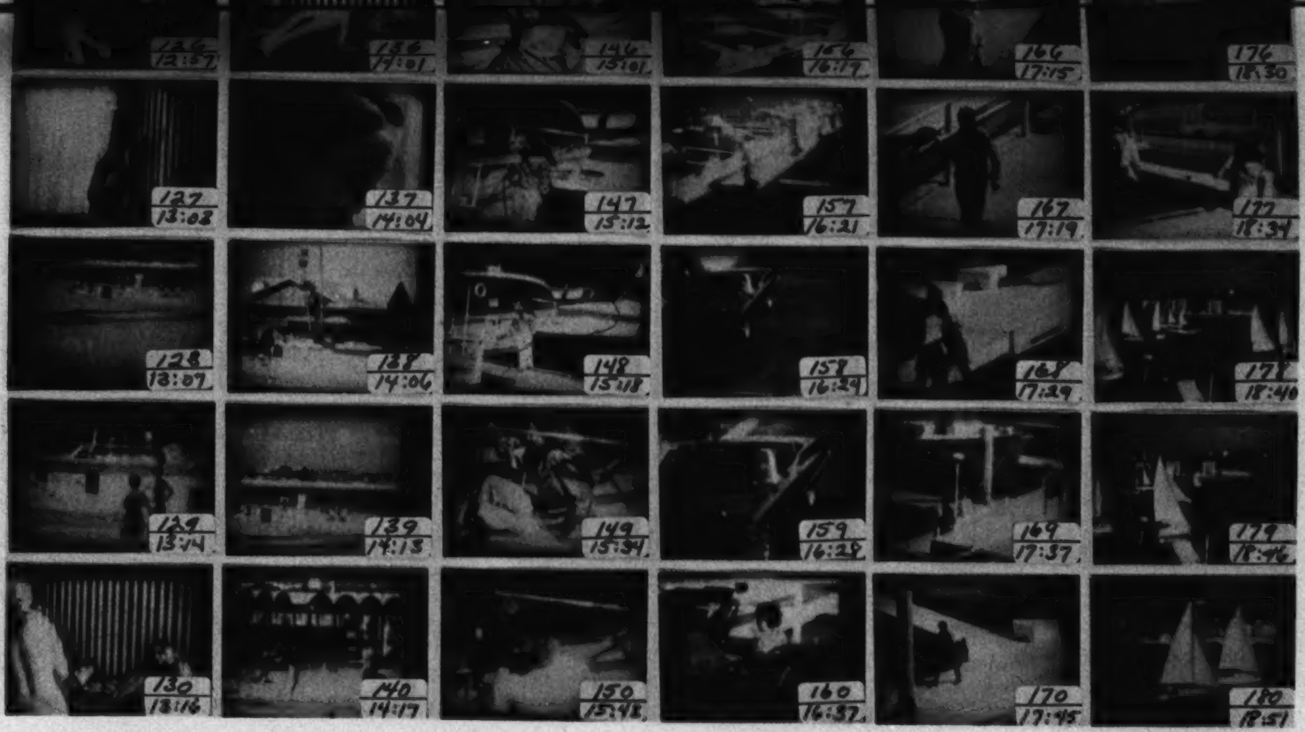
67 6:36
77 7:37
97 9:37
107 10:55
117 11:55
68 6:41
78 7:40
88 8:45
98 9:44
108 10:44
118 11:58
69 6:50
79 8:01
89 8:50
99 9:49
109 10:55
70
80 8:05
90
100 9:54
110
120

Lesbian activity 61-66; males in auto 67-69; lesbian repose after climax 70-71; males in auto 73; females 1 and 2 discuss need for a man in sex life 74-117; males in auto 118; females decide to go look for men 119-120.

"IT ALL COMES OUT IN THE END"
(Part 3 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

121 12:20
131 13:21
141 14:25
151 15:51
161 16:45
171 17:52
122 12:28
132 13:26
142 14:30
152 15:58
162 16:50
172 18:03
123 12:38
133 13:36
143 14:39
153 16:04
163 16:56
173 18:11
124 12:46
134 13:42
144 14:47
154 16:08
164 17:02
174 18:17


126 12:57
136 14:01
146 15:01
156 16:19
166 17:15
176 18:30
127 13:08
137 14:04
147 15:12
157 16:21
167 17:19
177 18:34
128 13:07
138 14:06
148 15:18
158 16:24
168 17:29
178 18:40
129 13:14
139 14:13
149 15:34
159 16:28
169 17:37
179 18:46
130 13:16
140 14:17
150 15:48
160 16:32
170 17:45
180 18:51

Females decide to go look for man 121-127; female 1 and 2 arrive at York Club Waterfront 137-156; two males and females 1 and 3 at dock area 145-157; two males arrive and go in opposite direction 158-176; female 1 meets male 1.

"IT ALL COMES OUT IN THE END"
(Part 4 of 12 Parts)

nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

181
19:02
182
19:06
183
19:12
184
19:17
191
19:57
192
20:08
193
20:09
194
20:12
201
20:52
202
20:54
203
20:58
204
21:02
211
21:33
212
213
21:57
214
221
22:37
222
22:42
223
22:47
224
22:50
231
232
233
234

187
197
207
217
227
237
188
198
208
218
228
238
189
199
209
219
229
239
190
200
210
220
230
240

Female 1 invites male 1 to her apartment for coffee 180-193; female 2 (blonde) arrives with male 2 (companion of male 1) 194-209; female 2 in kitchen talks to male 2. They embrace 210-219.

Male 1 talks to female 1 and are joined by other couple 220-224; male 2 and female 1 (brunette) go into bedroom; male 2 forcibly undresses female 1 228-240.

"IT ALL COMES OUT IN THE END"
(Part 5 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

241 23:47
251 24:28
261 24:58
271 25:57
281 26:08
291 26:57
242 23:50
252 24:31
262 25:01
272 25:41
282 26:10
292 26:41
243 23:55
253 24:55
263 25:05
273 25:44
283 26:15
293 26:44
244 24:02
254 24:58
264 25:09
274 25:48
284 26:17
294 26:47

246
24:11
256
24:45
266
25:16
276
286
26:22
296
247
24:15
257
24:48
267
25:20
277
25:57
287
26:24
297
248
24:19
258
24:51
268
25:25
278
26:01
288
26:27
298
27:02
249
24:22
259
24:53
269
25:29
279
289
26:30
299
27:07
250
24:26
260
24:55
270
280
26:05
290
300

Female 2 in living room does strip tease for male 1 241-247; male 2 engages female 1 in sexual intercourse and cunnilingus 248-261; In bedroom, male 2 and female 1 engage in cunnilingus and fellatio 276-288; female 2 undresses male 1 in living room 290-296; female 1 and male 2 in sexual intercourse in bedroom 297-300.

"IT ALL COMES OUT IN THE END"
(Part 6 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

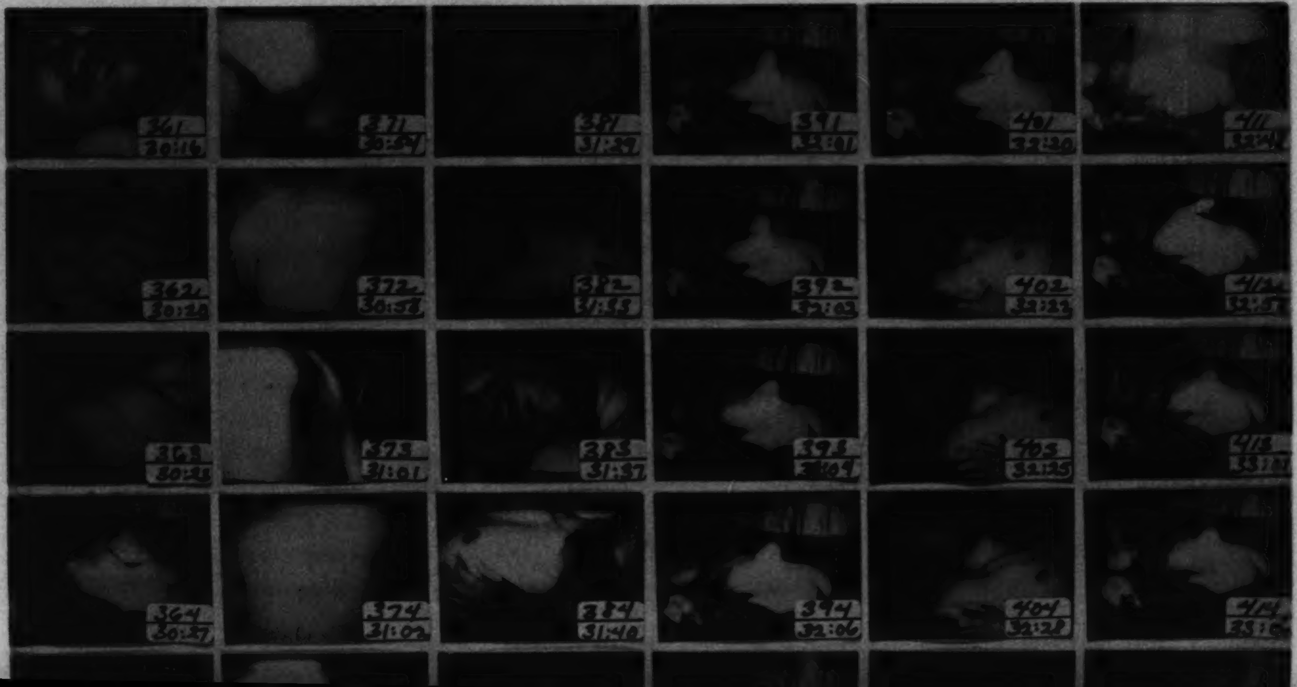
301 27:13
302 27:18
303 27:19
304 27:22
311 27:44
312 27:47
313 27:50
314 27:53
321 28:15
322 28:17
323 28:20
324 28:25
331 28:49
332 28:55
333 28:56
334 28:59
341 29:25
342 29:28
343 29:31
344 29:35
351 29:52
352 29:52
353 29:55
354 29:57

307
27:30
317
28:01
337
29:18
347
29:41
308
27:34
318
28:04
338
348
29:43
309
27:57
319
28:07
329
28:41
339
29:20
349
29:46
310
320
330
340
350

Female 2 undresses male 1 in living room 290-296; female 1 and male 2 in sexual intercourse in bedroom 297-302; female 2 mounts male 1 in living room 303-314; sexual intercourse in bedroom, male on top 315-331; female 2 undresses male in living room and starts fellatio 332-340; sexual intercourse in bedroom, male on top 341-360.

"IT ALL COMES OUT IN THE END"
(Part 7 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)



361 30:16
371 30:54
381 31:29
401 32:20
362 30:20
372 30:58
382 31:33
392 32:03
402 32:22
373 31:01
383 31:37
403 32:25
364 30:27
374 31:02
384 31:40
394 32:06
404 32:28

367
30:41
377
31:12
387
31:49
397
32:12
407
32:36
411
368
30:44
378
31:18
388
31:52
398
32:14
408
32:39
412
369
30:46
379
31:21
389
31:55
399
32:16
409
32:42
413
370
380
390
400
410
414

Female 2 performs fellatio on male 1 in living room 361-4 20

"IT ALL COMES OUT IN THE END"
(Part 8 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

421
431
34:14
441
451
461
35:40
422
432
34:16
442
34:44
452
462
423
433
34:18
443
453
463
424
434
34:20
444
454
464
35:47

427
33:59
437
34:28
447
34:58
457
35:32
467
35:55
477
36:27
428
34:03
438
34:31
448
35:01
458
35:36
468
35:59
478
36:29
429
34:07
439
34:34
449
35:06
459
35:37
469
36:02
479
36:32
430
34:11
440
450
460
470
480

Male 1 has climax 421-432; sexual intercourse in bedroom, male on top 433-453; in bedroom, male 2 forces female to perform fellatio 454-480.

"IT ALL COMES OUT IN THE END"
(Part 9 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

481
36:37
491
37:14
501
511
521
531
482
36:41
492
37:18
502
37:59
512
522
532
39:37
483
36:45
493
37:24
503
38:04
513
523
39:01
533
39:42
484
36:49
494
37:29
504
514
38:27
524
39:07
534
39:46

486
496
506 38:14
516 38:32
526 39:15
536
487 36:59
497 37:41
507 38:15
517 38:35
527 39:18
537 40:12
488 37:04
498 37:44
508 38:16
518 38:38
528 39:22
538 40:16
489 37:07
499 37:46
509 38:17
519 38:41
529 39:27
539 40:20
490 37:11
500
510
520
530 39:30
540 40:21

Fellatio in bedroom 481-483; sexual intercourse, male on top 484-523; sexual climax; male 2 exists bedroom and female 2 enters bedroom 524-531; male 2 joins male 1 in living room 532-540.

"IT ALL COMES OUT IN THE END"
(Part 10 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

547
40:49
557
41:38
567
42:24
577
43:18
587
43:54
548
40:59
558
41:41
568
42:29
578
43:17
588
44:01
549
41:04
559
41:46
569
42:39
579
43:21
589
44:04
550
41:09
560
570
580
590
44:07
600

Males 1 and 2 reach homosexual understanding in living room 541-550; females 1 and 2 engage in lesbian acts in bedroom 551-559; males 1 and 2 enter bedroom 560-565; males 1 and 2 engage females 1 and 2 in sex orgy 566-576; males perform cunnilingus on females 577-600.

"IT ALL COMES OUT IN THE END"
(Part 11 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

601
44:46
611
45:17
621
631
641
47:11
651
602
44:49
612
45:20
622
46:01
632
642
47:14
652
603
44:54
613
45:25
623
46:03
633
643
47:17
653
604
614
624
634
644
654

607
45:06
617
627
46:17
637
636
608
45:10
628
638
47:02
609
45:13
619
45:50
629
639
47:06
610
620
630
640
650

Males perform cunnilingus on females 601-611; male 1 engages female 2 in sexual activity 612-621; male 2 and female have sexual intercourse, male on top 622-638; male 1 performs cunnilingus on female 2 639-641; sexual intercourse, male on top 642-660.

"IT ALL COMES OUT IN THE END"
(Part 12 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)

Sexual intercourse 661-667; the end 668-670.

San Francisco, Calif.
Chronicle
(Cir. D. 480,233 Sat. A.M 450,227)

JAN 1 6 1971

Allen's P. C. B. Est. 1888

Prosecutor's View

Hope for End to Bestiality Films

By Maitland Zane

"I think that verdict will put a stop to the animal ovie movement—if there was a movement." Jerome Benson predicted yesterday.

Benson is the 31-year-old assistant district attorney who two days ago won his first conviction in a porny-movie case.

He said he was "extremely pleased" when the Municipal Court jury of six men and six women found Jackie Simpson, 41, guilty of showing an obscene film. It was the bestiality movie "Animal Lover," which stars a Danish farmgirl having sex with a dog, pig and horse.

APPEAL

Simpson, 41, a former operator of night clubs in Texas and Colorado and present owner of the 105 Turk Street theater, is appealing the conviction, which carries a maximum sentence of six months in jail and a $1000 fine.

Benson, who makes no secret of his loathing of sex films and the people who show them, commented, "There's gotta be something wrong with a guy to show movies like that."

He continued:

"I think one of the good effects of this verdict will be that it will show the average citizen that there are laws against showing obscene material, and that the laws are being enforced.

"The verdict will also show that it's not only police officers and our office, but jurors who share this concern."

A trial date will be set later this month for Robert Hubsch who also showed a bestiality movie, "Mrs. McDonald's Farm," at his Mini-Adult theater in the Tenderloin.

But Benson said he isn't going to concentrate just on "sick sex" movies.

"I think the emphasis will continue on all forms of hard-core films," he said.

Another porny movie trial begins next week, that of attractive Arlene Elster, 29, operator of the Sutter Cinema and co-promoter of last month's First International Erotic Film Festival.

EROTIC

Miss Elster, who said on the Dick Cavett Show two nights ago her films are "erotic" rather than "pornographic," will be the first woman to be tried for showing sex movies. Hers are hard-core as any, but she indignantly draws the line at bestiality and other bizarre perversions.

Another retrial of Gino Del Prete, 39, operator of Expo 69, is set for February 1. His first two trials ended in hung juries.

POOR COPY

RockyMtnNews
Denver,Colo.

Seccombe pushes pornography cle an-up campaign in Denver

A major impact from 'Animal' trial

By CECIL JONES and JEFF ROSEN
Rocky Mountain News City Hall Reporters

Who knows how many upstanding Denver citizens and public servants were chagrined last month when Denver Dist. Atty. Jarvis Seccombe decided it was time to clean up downtown Denver?

The target of Seccombe's attack was "Animal Lover," a 30-minute film which depicts a Danish woman in a variety of sexual escapades with three quadrupeds, to wit: A dog, a pig and a horse.

According to E. Stuart Grousman, manager of the Old Chelsea Theater at 1433 Tremont Place, his customers include Denver police and firemen and card-carrying city employes. Two Denver judges are no strangers to his theater, he added. Of course they're all admitted free.

WASN'T SPARED

But Grousman's alleged largess toward the pillars of city government failed to spare him when Seccombe, acting in the tradition of his mentor, former DA James D. "Mike" McKevitt, loosed his deputies against "Animal Lover" last month. In 1969, McKevitt tried with notable lack of success to run the film "I am Curious (Yellow)" out of town.

"Curious," one of the pioneers in X-rated movies, looks like an innocent indiscretion in Aunt Sally's garden next to the barnyard antics of "Animal Lover."

A trial to determine whether the film is obscene has been set for Oct. 16 before County Judge L. Paul Weadick. As of the weekend defense attorneys were rounding up a battery of "expert witnesses" from all parts of the country. The DA's office, meanwhile, is raring to go to trial right away. The proceedings promise to offer many interesting points.

THREEFOLD MISSION

Seccombe launched his war against "Animal Lover" on July 18. His deputies were given a threefold mission: Seize the film in a legally unimpeachable way, get the case beyond hearings on constitutional issues and into court, and use the ensuing obscenity trial as a precedent for future attacks on "smut peddlers."

To this end, Deputy DAs Coleman Connolly and Fred Rogers went before Weadick July 21 to ask for a court order allowing them to videotape a showing of "Animal Lover."

Three days earlier Police Officer T. W. Tabor had viewed the film and written an affidavit giving his version of what took place on the screen. Tabor's affidavit is one of the most staggering documents ever to pass through City Hall.

Armed with a videotape that included all but 12 minutes of the film, the deputies later returned to Weadick's court and convinced him there was sufficient cause to believe that "Animal Lover" was obscene under state law.

LIGHTS WERE DIMMED

A hearing was set for July 25 before Presiding Judge George A. Manerbino. Once again the lights were dimmed and the videotape viewed. The DAs then cleared yet another hurdle—granting of a search warrant to seize the film as evidence for a trial.

Earlier the same day Grousman and his attorney, Leland Huttner, had told Connolly they would surrender the film voluntarily if the DA would drop the prosecution. Connolly conferred with Seccombe, who refused. When police arrived at the theater that afternoon "Animal Lover" had left for parts unknown.

Meanwhile charges of promoting obscenity and conspiracy had been filed in County Court against Grousman and two more of Old Chelsea's corporate directors—Melvin D. Hannerg

Grousman said he was stunned by the charges. "Animal Lover" was not a morally degenerate film, he argued, but a documentary made to show acts of bestiality that have already been depicted in such noted works of literature as "the Bible" and Hitler's 'Mein Kampf.' "

The timing of Seccombe's attack on the Old Chelsea has all the earmarks of a political ploy. Draped in virtue, the fighting DA tilts with smut merchants. A superb election gambit, however trite.

OBSCENITY STATUTE

It's noteworthy that at every possible juncture Seccombe's deputies have stoutly refused to go along with any trial delays. Connolly denies that his haste has any connection with the Nov. 7 election, and instead advances the fairly plausible argument that the DA's office would have been busting hard-core porn houses long ago if it had been armed with the proper legal tools.

They now have these tools, Connolly says. One of them is a new obscenity statute that went into effect July 1. Another is a landmark Colorado Supreme Court decision of last Dec. 6 that laid down explicit guidelines for the seizure of allegedly obscene materials.

He has argued against all trial continuances, Connolly maintains, because the court guidelines call for a swift disposition of obscenity cases involving seized evidence. The validity of this argument would seem questionable in light of the fact the DA has seized no evidence.

Quibbles aside, however, there's little doubt that more prosecutions will follow should the new legal machinery (one City Hall cynic calls it "Seccombe's new toy") stand up in court against "Animal Lover." Rogers, Connolly's sidekick, was asked if the Old Chelsea matter was just the first chapter in the DA's drive to "clean up Denver."

"That would be a fair thing to say," he replied.

It is questionable, however, whether the DA will ever get another crack at a film in which the principal actors include a dog, a pig and a horse.

HEADS DEFENSE

Both sides will be armed to the teeth when the "Animal Lover" trial opens seven weeks from now before Judge Weadick. Grousman et al have hired Arthur Schwartz, perhaps Denver's most practiced attorney in obscenity cases, to head up their defense with Huttner as co-counsel. Schwartz was in San Francisco this week lining up one of his witnesses. The DA's office, of course, has determined to go for broke against "Animal Lover."

Barring further pre-trial motions, the first order of business will be jury selection. This will be a difficult process requiring at least a full day, Huttner says, because the defense must find six jurors capable of rendering a fair and impartial verdict about a sexually explicit movie. In some obscenity cases the voir dire (questioning of potential jurors) process has included the showing of scenes clipped from hard-core movies, he explained.

VIEW VIDEOTAPE

Once selected, the jury presumably will have to view the videotape of "Animal Lover"—or, if it is available the color film itself. This could be highly extraordinary experience for some jurors. A visit to the jury room on the fourth floor of City Hall suggests that most persons who gather there are not patrons of "XXX"-rated movie houses, especially those exhibiting bizarre bestiality.

Potentially even more interesting than the amours of a Danish woman who prefers animals because men can't be "trusted" will be

SEX EDUCATION COURSES

Chief among them will be one Dr. Theodore McIlvenna (spelling provided by Schwartz), head of the Glide Memorial Methodist Foundation in San Francisco. According to Schwartz, the foundation provides sex education courses and marriage counseling.

There will be at least two more "experts," he said, possibly including a psychologist associated with "a university in Louisiana" and a Colorado College professor who shows X-rated movies to his sex education class.

These witnesses will offer "scientific evidence as to whether bestiality has an effect on the prurient interests of the average person," Schwartz said. "We don't think it does."

But the key point of his defense, Schwartz added, will be a vigorous constitutional challenge of Colorado's new obscenity statute.

The upcoming "Animal Lover" trial raises some other striking legal questions. Will the drapes be drawn and persons under 18 excluded from the courtroom? Will there be a jury of one's peers, including a dog, a pig and a horse?

LEGAL IMPORTANCE

Despite their comic aspects, the proceedings against "Animal Lover" will be of serious legal importance and could have a substantial impact on theater and bookstore owners in Denver. Even if the DA fails to get a conviction, the fact that he pushed "Animal Lover" through the trial process would indicate he now has the legal machinery to get obscenity cases before a jury.

This victory could in turn produce an all-out campaign to prevent Denver citizens from exercising their choice to view or not to view hard-core pornography, as trashy or artful as it may be. Such a campaign would be applauded by some, and lamented by others.

6 1972

ORADO
RESS CLIPPING
SERVICE
R, COLORADO 80204

Contempt erm Given n 'X' Films

By KEN PEARCE
Denver Post Staff Writer

he head projectionist of an ted Denver theatre was d in contempt of court day and sentenced to serve n days in Denver County

is William J. Stolar of Corona St. who works at Act I & II Cinema Theatre 40 W. Colfax Ave.

unty Judge Paul Weadick red a 15-day stay of execu- to give Stolar's attorney, Hoyman, time to file an al.

e contempt finding stems an order signed by County e George Manerbino Sept. recting operators of the re to allow representatives e district attorney's office deotape eight short sub- which Detective Walter R. had viewed previously concluded were possibly ne.

T TO THEATRE

is, in an affidavit, said he to the theatre with other ers of the DA's staff at 1:30 p.m. on Sept. 18.

investigator said he ized one of the films be- own as one of the eight l viewed previously.

s said he and the other gators set up the video

was to begin, the film stopped and the theatre's lights came on. The investigator said another projectionist told him the film was broken and it would take him five minutes to fix it.

About 20 minutes later, Lonis said, a film appeared on the screen but it wasn't one of the eight he'd previously seen. That projectionist, later identified as Robert J. Sullivan, was taken before Judge Manerbino who told him he would have to show the films for videotaping.

Lonis said he and the other investigators returned to the theatre only to find the front doors locked.

DROPPED SOMETHING

The investigator said he went around to the back door and saw Stolar coming out. As Stolar saw him, Lonis said, Stolar dropped something on the floor.

Lonis said he then entered the theatre and saw eight rolls of film in plain white cartons. He said Stolar told him the theatre was closed because the equipment was broken down.

Lonis said he went to the projection booth with a deputy district attorney and found that the two projectors which had been showing the short subjects had been removed and another projector in a broken condition was sitting on the shelf in place of the other two projectors. He said the two projectors which he had observed showing movies in the theatre had been removed and there was no film in the projection booth whatsoever.

Stolar didn't testify at the contempt hearing.

BOXOFFICE :: October 16, 1972

Move Against X Films Is Blocked by Court

DENVER—Judge John Brooks jr. of the Denver District Court acted on a motion by defense attorneys that threw an effective roadblock against further action against X-rated movies in Denver, at least until the district attorney can come up with a different and legal approach. The judge took the action as the result of a motion of four attorneys representing theatres showing X films. An injunction was issued prohibiting the district attorney's office from continuing its procedure against "adult" theatres, terming the action illegal.

Appeal to State Court

It was indicated the district attorney would appeal the case at once to the Colorado Supreme Court. If this action does not produce the desired result it then is up to the district attorney to devise a different course of action.

In the campaign against X-rated films, which began in July, a detective would attend the theatre, view the film and, if it was thought to be "obscene," he would make such a report in an affidavit to the presiding judge, George Manerbino, who then would issue an order directing the Denver police to videotape the motion picture. After viewing the videotape the judge would decide whether he would hold an "adversary hearing."

After the filming, arguments would be heard and, if the judge decided that maybe the film was obscene, he would order the case into court, order the film seized and charges would be filed and a trial date set.

One result of the district attorney's
tions has been that the head projectionist
the Act I and II theatres was judged to
in contempt of court and sentenced to sev
days in the county jail. This was the res
of the disappearance of the film in questi
"Animal Lover." When officers went to t
theatre to impound the film, it was fou
that the program had been changed
later two employees of the theatre were
carrying several rolls of film away from
showhouse.

No Basis for Action

Judge Brooks declared there was no b
for the actions taken by the county court-
in which an individual comes before
court, gets an order to videotape and w
the order then being served on the offe
ing theatre. When Judge Manerbino wa
witness he declared the procedure
"established" by the district attorney's
fice.

Attorney Bernard Morley, representi
Studio E Theatre, said the method was
"star chamber proceeding" and told
court it should terminate the procedur
which violates the basic rights to whi
each of us is entitled.

Arthur M. Schwartz intervened in
hearing as attorney for three theatres—
Galaxy, Old Chelsea and Hayloft. The

torneys produced witnesses that proved th
none of the proceedings had been docke
in the proper manner; therefore, they h
no way of knowing whether they w
criminal or civil matters, among oth
things.

THE NEW YORK TIMES, SUNDAY, AUGUST 20, 1972

Obscenity Issue Pending Before the U.S. Supreme Court Slows Drive on Smut in Times Square

ayor Lindsay's campaign
inst pornography in the
es Square area has been
ed for the time being by
obscenity case pending be-
the United States Supreme
rt.

two cases last week, films
the police had seized in
s on Times Square theaters
to be returned to the the-
operators after their law-
convinced a Criminal Court
e that his authorization of
seizure was illegal. The
s dealt with sodomy.

score of raids against peep
s in the Times Square area
d the shows down for two
, but legal proceedings
st the operators were de-
d after the operators ob-
d injunctions barring the
s from interfering with the
rprises.

ymour S. Detsky, counsel
0 of the operators, sought
junction, charging that the
entered the peep-show
es without warrants,
d films before examining
and without warrants and
ut having an adversary
eding on their alleged ob-
y, and used pickaxes ille-
to put the peep-show ma-
s out of business.

agreement with the city's
ration Counsel, the police
directed not to interfere
he enterprises, pending a
f the charges of obscen-
d the countercharges in
al Court next Tuesday.

deterioration of the area
en widely attributed to
roliferation of movie
showing films on sex
ain, peep shows offer-
a strips involving what
the owners call "soft-core" pornography, unlicensed "massage parlors" and bookshops peddling books, pamphlets, photographs and devices on sexual themes.

Because of the protests of midtown businessmen, including many from the theater district who believe that the spread of pornography shops has hurt their industry, the Mayor ordered members of his administration to meet with representatives of the District Attorney's office last July 12 to plan a long-range campaign against pornography.

But the campaign met with increasing ineffectuality and, last Thursday, the police found themselves powerless to halt the showing of a film advertised as a portrayal of sodomy.

The film was "Deep Throat," presented at the World Theater, 153 West 49th Street, two doors east of a church, the Times Square chapel of the Salvation Army. At the request of the police public morals division, Criminal Court Judge Ernst Rosenberger, viewed the film with Patrolman Michael Sullivan on Thursday night, then signed an order authorizing the police to seize the film when the theatre closed at 1 A.M. Friday.

A summons was served on the owner of the theater, Robert Sumner, and he was ordered to appear in court later in the day. Mr. Sumner's lawyers argued that Judge Rosenberger acted contrary to law in signing the authorization because he had failed to give the owner an adversary hearing first on whether the film was obscene.

Judge Rosenberger ordered
recess while he researched t
law. Returning to the bench
4 P.M., he said he had to agr
with the defense attorney, M
Detsky, and ordered the poli
to return the film. However, h
also directed that a subpoen
be served upon the lawyer
produce the film in court at
further hearing on Sept. 8.

The issue is one that is no
before the Supreme Court for
rehearing. The court has agre
to decide whether a judge w
has seen an allegedly obsce
movie may issue a search w
rant to seize it from a theat
without first giving the theat
owner a hearing on wheth
the film is obscene.

At present, a film case mu
go through laborious appe
to the High Court, which m
take years, before the poli
can act to halt its presentatio
enabling, in a case where t
crime is proved, the operato
to profit from their condu
before the law may intervene

In the "Deep Throat" ca
the theater owner, Mr. Sumne
substituted a second print
the film and the house open
on schedule at 10 A.M. Frida
with no halt in its activitie
The film was still being show
yesterday afternoon.

In a second case, howeve
involving a film titled "
Sticky Situation, seized
Thursday at the Hollywoo
Twin I Theater, Eighth Aven
and 47th Street, the film w
not shown again after its r
turn on Friday. That case w
also heard by Judge Rosenber
er.

Deputy Inspector Joseph
Lynch of the public morals d
vision said his men would co
tinue to hand out summons
when they found theaters an
peep shows presenting mat
rials held to be obscene.

The injunctions and the Ro
senberger ruling only preve
the police from seizing the m

Democrat and Chronicle Local

ROCHESTER, N. Y., SATURDAY, MARCH 18, 1972

Police Give Movie a Low Rating

MONROE
ADULTRY FOR FUN
AND PROFIT
X
MONROE
ADULTRY FO FUN
AND PROFIT
X

By TOM RYAN

Rochester vice detectives last night seized an X-rated film called "Adultery for Fun and Profit" at the Monroe Theatre, 585 Monroe Ave.

Detective Lawrence Catalfamo said about 50 patrons who were in the theater left after the raid.

John Antes Jr., 19, of 308 Benton St., who told detectives he is a trainee manager for Countrywide Theatres Inc, was charged with second-degree obscenity.

While the Monroe raid was being conducted, 15 to 20 members of Citizens for a Decent Community were picketing another Countrywide theater, the Riviera, at 1451 Lake Ave. Two X-rated films, "School Girl" and "The Undergraduate," were being shown there.

The film seizure at the Monroe resulted from a complaint from Citizens for a Decent Community, Detective Capt. James Lee said.

Yesterday afternoon, City Court Judge Carl R. Scacchetti, Assistant Dist. Atty. Howard R. Relin and vice detectives viewed the film. Arrest and search warrants were issued last night by Scacchetti and four detectives executed them shortly before 8 p.m.

While the film was being seized, about 20 persons, including several couples, waited in the lobby for the next showing.

They were told that the film was seized and that another film would be shown later. A theater employe said it also was an X-rated movie "but kind of a mild one."

While detectives were loading the seized film into their car, a man who apprently had been in the theater asked them, "Why don't you solve murders and crimes instead of butting into people's bedtime stories?"

Catalfamo told the man he and his men were on a special squad and the complainant drove off.

Antes was released in
bail and will be arraig
City Court today on the
demeanor charge,
carries a maximum pe
of a $500 fine and a yea
jail.

Linn Smeal, division
ager for Countrywide The
Inc., said early this mor
that the attempt by "a
ority to censor" was a
tion of many persons' co
tutional rights and 'not
this country is all about.

"There was no one a
theatre who had their
twisted to come into
screen offering," he said.

and Chronicle

Local

ROCHESTER, N. Y., FRIDAY, JULY 7, 1972

Weather 2B
Obituaries 3B

SECTIO
B

Readers Ask HELP!

keRodeo us Swim

[illegible]

CH PFLAUMER, ROCHESTER

[illegible]

rist 'Recharged'

[illegible]

THADDEUS ORLOWICZ, ROCHESTER

[illegible]

ents Speeded

[illegible]

d Received

[illegible]

E. PERRY, ROCHESTER

[illegible]

l Student

[illegible]

NITA A. SITO, BATAVIA

[illegible]

the D&C . . .

[illegible]

Summer School: Harder to Enter

By KATHY O'TOOLE

[illegible]

In The Class

[illegible] Charles Murray, [illegible]

[illegible]

Please turn Page

D&C Photos by Lou Mensell

Bystanders watch from playground as officer walks up to railroad tracks.

Tragedy Follows Frolic

By MICHAEL WALSH

[illegible]

Officer Joe Scalone puts sneaker and hat in bag.

[illegible]

Emergency Calls

Hot Line OK Seen by Fall

[illegible]

Police Ordered To Return Film

[illegible]

Democrats Pay 'Quig' A Tribute

An editorial tribute to Mr. Quigley, C4.

[illegible]

'Jury' of Peers Studies Drug Death

[illegible]

'He took maybe 15 or 20 pills . . .'

[illegible]

Dean Goldberg at 'Superstar' rehearsal.

sford 'Superstar'

[illegible]

'SESAME STREET'

From 1C

[illegible]

Film Prizes Go to Kids

[illegible]

It's Great for
SINGLE MEN
442-3260

LOEW'S
WARREN BEATTY GOLDIE HAWN
in $ (Dollars)

DANCE
To The Music Of The
RHYTHM KINGS
FRIDAY & SATURDAY
C & M
LOUNGE
LYELL AVE.

THE COWBOYS
Cinema II

BOWLING by MOONLIGHT
$7.00 Per Couple
ALL YOU CAN EAT
ALL YOU CAN BOWL
Olympic Bowl

ATES BOWL
Spencerport Rd.

HAIR
HAIR

LOVE STORY
Ali MacGraw Ryan O'Neal
Liza Minnelli The Sterile Cuckoo
Lakeshore

REVIVAL CINEMA
THE MARX BROTHERS

BUTTERFLIES ARE FREE
"Best Broadway Play of The Season"
LEONARD GERSHE

SHOWPLACE TWIN
1
$000 FRIENDS
DYAN CANNON
7:30 & 9:45
2
TWIN MATINEE FEATURE
SAT. & SUN. ONLY
SHOWPLACE 1
A HAUNTED HOUSE
1:00 & 3:00
SHOWPLACE 2
PLANET of the

TODAY and SUN. at 1:00 and 3:00
"DESTROY ALL MONSTERS"
AMERICAN INTERNATIONAL
GODZILLA · MOTHRA · RODAN · MANDA . COLOR
FOR ALL!!
RIVIERA — CORONET

The singers, dancers and soloists of
Up with People

"One of the treasures of the American Theatre"
HAL HOLBROOK
"MARK TWAIN TONIGHT"
TUES., MAR. 21 — 8:15 P.M. — EASTMAN THEATRE

CORONET
4 MORE DAYS
GONE WITH THE WIND
ADULTERY
RIVIERA
"SCHOOL GIRL"

IN PERSON!
Vienna Choir Boys

ACADEMY AWARD NOMINATIONS
BEST PICTURE, BEST DIRECTOR,
SCREENPLAY
CLOCKWORK ORANGE

33 Chestnut St.
454-5610
MATINEE TODAY!
JIMMY STEWART AND JEAN ARTHUR — 1939
"MR. SMITH GOES TO WASHINGTON"
"SHUT MY BIG MOUTH"
BONUS: W. C. FIELDS SHORTS, "THE GOLF SPECIALISTS" MATINEE SUNDAY!

rochester's finest theatres
LIFE IS A CABARET
PANORAMA

Fiddler on the Roof

LAST 4 DAYS!
WALT DISNEY'S
Lady and the Tramp

The U of R Concert Committee Presents
J.Geils
MARCH 18 at 9:00 P.M.
U of R Palestra

MARTINA THEATRES
THE LAST PICTURE SHOW
"A MASTERPIECE!"
PARAMOUNT
Made For Each Other
COLOR
Clint Eastwood
Dirty Harry
REGENT
julie christie/alan bates
the go-between
MARGARET leighton
COLOR
SUMMER OF '42
WARING
FRIENDLY NEIGHBORS
THEY ARE DOING IT ALL

Now At The Towne II
LAST 4 DAYS!

GEORGE C. SCOTT
"THE HOSPITAL"
FINE ARTS
THE FRENCH CONNECTION
COLOR
NOMINATED FOR 4 ACADEMY AWARDS
BEST ACTOR
WALTER MATTHAU
LAST 2 DAYS!
LITTLE

Players List Tryouts, Slate Rotary Play

[illegible]

"Sunday in New York," [illegible]

'Barefoot' Auditions Awaited in Henrietta

[illegible] "Barefoot in the Park," [illegible]

[illegible]

Double Duty Tonight For Singer

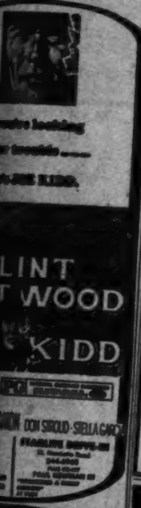
[illegible]

THE CHUCK MANGIONE QUARTET
PERFORMING FOR FLOOD RELIEF
FRI.-SAT., AUG. 11 AND 12—8:30 P.M.
NAZARETH ARTS CENTER
TICKETS [illegible] ON SALE AT [illegible]

Get on the Right Track...for old-time family fun!
[illegible]
FREE Picnic Park Area
ARCADE & ATTICA RR
ARCADE, N. Y. ON ROUTE [illegible]

MARTINA THEATRES
[illegible] of the year!
MAGIC!
WALT DISNEY
[illegible] YOU SEE HIM, [illegible] YOU DON'T
[illegible] ROMERO FLYNN BACKUS
[illegible]

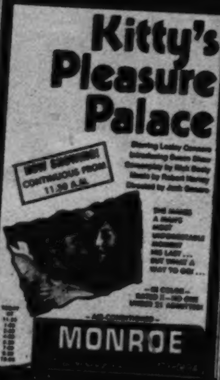
Trained to commit the most incredible caper ever conceived.
THE DOBERMAN GANG
Animal Desires... Human Lust
TWILIGHT PEOPLE
Lakeshore Drive-In Theatres Washington



[illegible]
[illegible]LINT [illegible]T WOOD
[illegible]KIDD
DON STROUD · STELLA GARCIA
[illegible]

Sunday, August 6
7:30 P.M.
FAMOUS SCIENTIST
TO SPEAK ON
PARAPSYCHOLOGY and E.S.P.
Sheraton Inn
Rochester Airport
1100 Brooks Avenue
Rochester, New York

A NEW EXPERIENCE IN GROUP LOVE
SESSIONS
NOW!
PLUS
A TRUE COURSE IN LOVE MAKING...
UNDINE
NOW!
GRAPHICALLY DEMONSTRATED
LATE SHOW TONITE —AIR CONDITIONED—
"SESSIONS" 1:00-4:00-7:00 AND 10:00
"UNDINE" AT 2:30-5:30-8:30-11:30
RIVIERA



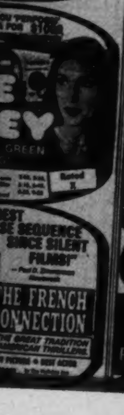
Kitty's Pleasure Palace
NOW SHOWING CONTINUOUS FROM 11:30 A.M.
[illegible]
—IN COLOR—
RATED X—NO ONE UNDER 21 ADMITTED
—AIR CONDITIONED—
MONROE

CAPITOL
"COTTON COMES TO HARLEM" & "BORN to WIN"

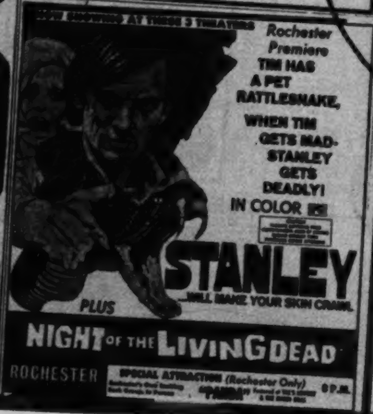
[illegible] $10 [illegible] DISCOUNT

HELD OVER! TWO ADULT HITS!...
SCHOOL GIRL
PLUS
THE [illegible]
BOTH IN COLOR—BOTH RATED X
NO ONE UNDER 21 ADMITTED
X-RATED
CORONET

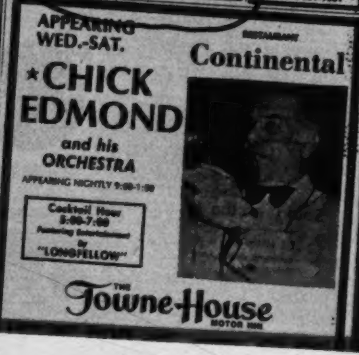
JUST FOR LAUGHS
TOWN & COUNTRY PLAYHOUSE
[illegible]
A NEW POLITICAL PLAY
BARRY NELSON
WALTER ABEL
SCOTT McKAY
IN
CONFLICT OF INTEREST
[illegible]
PHONE 381-1001



[illegible]
GREEN
Rated X
[illegible] SEQUENCE SINCE SILENT FILMS!"
THE FRENCH CONNECTION
[illegible]



NOW SHOWING AT THESE 3 THEATERS
Rochester Premiere
TIM HAS A PET RATTLESNAKE, WHEN TIM GETS MAD- STANLEY GETS DEADLY!
IN COLOR
STANLEY
...WILL MAKE YOUR SKIN CRAWL
PLUS
NIGHT OF THE LIVING DEAD
ROCHESTER
SPECIAL ATTRACTION (Rochester Only) [illegible] 8 P.M.



APPEARING WED.-SAT.
★CHICK EDMOND
and his ORCHESTRA
APPEARING NIGHTLY 9:00-1:00
Cocktail Hour 5:00-7:00
Featuring Entertainment by "LONGFELLOW"
RESTAURANT
Continental
THE Towne-House
MOTOR INN

Tanglewood Concert Honors Fromm

[illegible]

[illegible]

Jesuit Artists Share Summer of Ideas at Italian Villa

[illegible]

GOING OUT Guide

[illegible]

[illegible]

ROBERT DOWNEY, who gave us "Putney Swope" and "Chafed Elbows," is back with "Greaser's Palace," a brand new miracle of a movie.

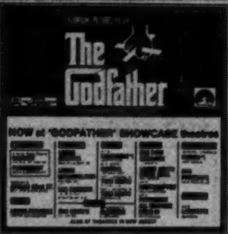
"Downey is always like a breath of rare air, and this time out he has concocted a frantic fermentation filled with way-out weirdos and marvelous misfits, giving it all a diabolical dash of showmanship and showbiz, as only he can."
—Bob Salmaggi, Westinghouse Radio

"In what must be the big nose-thumb of the season, plus, Mr. Downey makes his own devastating comment on practically everything in this savage satire."—Archer Winsten, New York Post

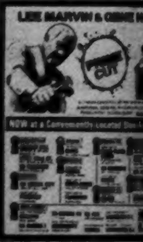
"A way, way-out vision. The wild Downey outlook keeps one interested throughout." —William Wolf, Cue Magazine

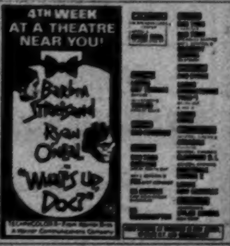
"'Greaser's Palace' has to be seen to be believed and chances are even then you won't believe it."—Kathleen Carroll, Daily News

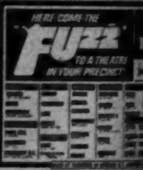
Greaser's palace
Festival Theatre
W. 57th St. off 5th Ave. Tel. [illegible]
[illegible]

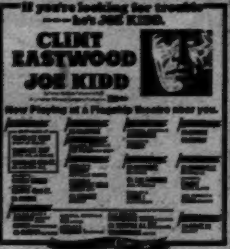

The Godfather
NOW at "GODFATHER" SHOWCASE theatres

THIS ONE BEATS THEM ALL
TEENAGE FANTASIES


LEE MARVIN &
CUT
NOW at a Conveniently Located


4TH WEEK AT A THEATRE NEAR YOU!
Barbra Streisand
Ryan O'Neal
"What's Up, Doc?"


HERE COME THE FUZZ TO A THEATRE IN YOUR PRECINCT


If you're looking for trouble — he's JOE KIDD.
CLINT EASTWOOD
JOE KIDD
Now Playing at a Flagship theatre near you.

55TH ST. PLAYHOUSE

CHARLIE CHAPLIN
in his greatest role
THE GREAT DICTATOR
LINCOLN ART
LAST WEEKS

Alfred Hitchcock's
FRENZY

ACTRESSES
CIRCUS

FARROW TOPOL
THE PUBLIC EYE

PHOTOGRAPHERS
See the schedule of / every Sunday in the

Beginning today, the Beekman Theatre presents 86 films from the New York Times Ten Best List of the last ten years.

Today's Show: It's A Mad, Mad, Mad, Mad World & That Man From Rio

1962
Lover Come Back 8/10
Last Year at Marienbad 8/30
Whistle Down the Wind
A Taste of Honey 8/27
Divorce Italian Style 8/16
Sundays & Cybele 8/25
Freud 8/14
Phaedra 8/18
*The Longest Day
*Long Day's Journey Into Night

1963
[illegible] 8/18
The L-Shaped Room 8/21
Hud 8/25
8½ 8/7
Tom Jones 8/2
Il Posto 8/11
It's a Mad, Mad, Mad, Mad World 8/10
America, America 8/15
Any Number Can Win 8/20
*Cleopatra

1964
Dr. Strangelove 8/3
That Man From Rio 8/10
One Potato, Two Potato 8/26
A Hard Day's Night 8/13
Woman in the Dunes 8/8
Marriage Italian Style 8/30
*The Servant
*Mary Poppins
*My Fair Lady
Americanization of Emily 8/29

1965
Darling 8/16
Ship of Fools
[illegible] 8/18
Juliet of the Spirits 8/18
Red Beard 8/19
Repulsion 8/5
To Die in Madrid 8/20
*The Pawnbroker
*The Eleanor Roosevelt Story
*Thunderball

1966
Dear John 8/31
The Russians Are Coming, The Russians Are Coming 8/15
Morgan 8/28
Who's Afraid of Virginia Woolf? 8/22
Georgy Girl 8/22
A Man For All Seasons 8/3
Blow Up 8/18
The Shop On Main Street 8/17
*Gospel According to St. Matthew
Loves of A Blonde 8/17

1967
La Guerre Est Finie 8/28
Ulysses 8/22
The Hunt 8/23
In the Heat of the Night 8/13
Father 8/16
Closely Watched Trains 8/12
Cool Hand Luke 8/27
In Cold Blood 8/13
The Graduate 8/30
Elvira Madigan 8/27

1968
Charlie Bubbles 8/14
The Two of Us 8/26
Belle de Jour 8/7
Faces 8/26
Les Carabiniers 8/14
The Bride Wore Black 8/1
The Fifth Horseman Is Fear 8/12
Petulia 8/17
Rosemary's Baby 8/28
A Report on the Party and the Guests 8/5

1969
Alice's Restaurant 8/11
The Damned 8/12
If.... 8/4
La Femme Infidele 8/6
Midnight Cowboy 8/2
Stolen Kisses 8/9
Topaz 8/18
True Grit 8/21
The Wild Bunch 8/19
Z 8/4

1970
The Ballad of Cable Hogue 8/16
Catch-22 8/30
Fellini Satyricon 8/18
*Little Big Man
Loving 8/22
Mash 8/19
The Passion of Anna 8/16
My Night at Maud's 8/20
Tristana 8/5
The Wild Child 8/1

1971
The French Connection 8/19
Sunday Bloody Sunday 8/9
Carnal Knowledge 8/18
Derby 8/18
Le Boucher 8/29
Claire's Knee 8/25
Bed & Board 8/25
The Conformist 8/4
*A Clockwork Orange
*The Last Picture Show

*NOT AVAILABLE

CLIP AND SAVE

49th ST. at 2nd AVE. • RE 7-2622 **BEEKMAN**

Now you can see "The Graduate" again or for the first time.

THE GRADUATE

Now at a theatre near you.

LA SALAMANDRE

OUR LATIN THING

IT'S A MAD, MAD, MAD, MAD WORLD

THAT MAN FROM RIO

2:35, 7:10

PRIME CUT

THE GODFATHER

12, 3, 6, 9

THE GRADUATE

THE SORROW AND THE PITY

1, 7:30

SLAUGHTERHOUSE FIVE

CABARET

"IT'S ALL FINE FUN"

CONQUEST OF THE PLANET OF THE APES

NOW AT RED CARPET THEATRES

BEN

KRAKATOA EAST OF JAVA

★ "BEAUTIFUL!" —WNEW-TV

"THE MOST KNOWING, HIPPEST, ENGROSSING POLITICAL MOVIE IN YEARS!" —Joseph Gelmis, Newsday

ROBERT REDFORD "THE CANDIDATE"

From Warner Bros.

SUTTON

CABARET

Exclusive Limited Engagement

"beautiful" "joyous"

woodstock

STARTS TOMORROW

ZIEGFELD

"A magnificent visual experience and an assault on the senses. Each of the four leads is exceptional." —JAY COCKS, Time Magazine

Deliverance

Starring JON VOIGHT · BURT REYNOLDS · PANAVISION® TECHNICOLOR® · From Warner Bros. A Warner Communications Company

LOEWS TOWER EAST

THROAT

ADULTS ONLY IN COLOR

WORLD 49th ST.

"LITERALLY EXPLODES THROUGHOUT 100 MINUTES OF ACTION!"

TECHNICOLOR® From Warner Bros. A Warner Communications Company

---

"A very good movie." —N.Y. Times

Super Fly

LOEWS STATE 2

LOEWS CINE

RADIO CITY MUSIC HALL

BUTTERFLIES ARE FREE

GOLDIE HAWN · EILEEN HECKART · EDWARD ALBERT

A NEW COLORFUL SPECTACULAR FEATURING THE ROCKETTES, THE BALLET COMPANY AND THE SYMPHONY ORCHESTRA

See how WOODY ALLEN made a movie out of

"Everything you always wanted to know about SEX*"

"UNFLINCHING, TOUGH AND DANGEROUS"

GEORGE C. SCOTT

STACY KEACH

THE NEW CENTURIONS

A Sticky Situation

HOLLYWOOD TWIN 1

JOHN HUSTON'S FAT CITY

From COLUMBIA PICTURES

The story of the first black President.

THE MAN

From the makers of "Bird with the Crystal Plumage"

whoever sees the flies-dies.

"Four Flies on Grey Velvet"

New York is a wonderland for children

Find out where the fun is. Look for the weekly listing of Amusements for Children every Wednesday on the Family Style Page of

---

if....

Criminal Court of the City of New York

Part 1A-2, County of New York

STATE OF NEW YORK,
COUNTY OF New York } ss.:

Deputy Inspector Charles Smyth, 1st. Division

of No. 1st. Division

being duly sworn, says that on July 31st, 1969 at about 5:30 p.m.

at 152 Bleecker Street (Garrick Theatre)

New York County, City and State of New York, the defendant(s) Saul Heller, Manager,

Susan [illegible], Ticket Taker or Cashier and Mark [illegible], Projectionist

committed the offense(s) of:

......CONSENSUAL SODOMY (Sec. 130.38 Penal Law), in that said defendant engaged in deviate sexual intercourse with another person;

......PUBLIC LEWDNESS (Sec. 245.00 Penal Law), in that said defendant, in a public place, intentionally exposed the private and intimate parts of his body in a lewd manner;

.XXXOBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did promote, and possess with intent to promote, obscene material;

......OBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did produce, present and direct an obscene performance;

......OBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did participate in a portion of an obscene performance which was obscene and which contributed to the obscenity of the performance.

in that Deponent states that the defendants did promote an obscene performance to wit: the showing of the movie "Blue Movie" and that said movie did depict a male and a female engaged in lewd and lascivious acts to wit: acts of sexual intercourse and other sexual contact, for a profit.

Sworn to before me
July 31st, 1969, 19__

[illegible]
Judge

Charles Smyth
Affiant

I hereby certify that [illegible] Copy of the Record on file in this Court

New York NOV 25 1969, 19__

Court Clerk

[illegible]

Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HELLER *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71-1043. Argued November 14, 1972—Decided June 25, 1973

Petitioner was manager of a movie theater where a sexually explicit film was exhibited. After police officers saw part of the film, an assistant district attorney requested a New York Criminal Court judge to view it. Upon seeing the entire performance, the judge signed warrants for seizure of the film and for petitioner's arrest on the ground that the film was obscene. Exhibition of an obscene film violates New York Penal Law § 235.05. No pretrial motion was made for return of the single film copy seized or for its suppression as evidence. There was no showing below that the seizure prevented exhibition of the film by use of another copy, and the record does not indicate whether another copy was available. Petitioner's trial was held 47 days after his arrest and the film seizure, and he was convicted. He argued that seizure of the film without a prior adversary hearing violated the Fourteenth Amendment. He also challenged his conviction on substantive grounds, arguing that he was convicted under standards of obscenity both overbroad and unconstitutionally vague, and that films shown only to consenting adults in private are constitutionally protected. The New York Court of Appeals affirmed his conviction, holding that an adversary hearing prior to seizure of the film was not required and that an *ex parte* warrant, issued after a judicial determination of obscenity, was constitutionally sufficient. *Held:*

1. Where a film is seized for the bona fide purpose of preserving it as evidence in a criminal proceeding, and it is seized pursuant to a warrant issued after a determination of probable obscenity by a neutral magistrate, and following the seizure a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. On a showing to the trial court

that other copies of the film are not available for exhibition, the court should permit the seized film to be copied so that exhibition can be continued pending judicial resolution of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned. With such safeguards, a pre-seizure adversary hearing is not mandated by the First Amendment. Pp. 4–10.

2. The case is remanded to afford the state courts an opportunity to reconsider petitioner's substantive challenges in light of *Miller* v. *California, ante,* p. —, and *Paris Adult Theatre I* v. *Slaton, ante,* p. —, which establish guidelines for the lawful state regulation of obscene material. Pp. 10–11.

29 N. Y. 2d 319, 277 N. E. 2d 651, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1043

Saul Heller, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[June 25, 1973]

Mr. Chief Justice Burger delivered the opinion of of the Court.

We granted the Writ in this case to determine whether a judicial officer authorized to issue warrants, who has viewed a film and finds it to be obscene, can issue a constitutionally valid warrant for the film's seizure as evidence in a prosecution against the exhibitor, without first conducting an adversary hearing on the issue of probable obscenity.

Petitioner was manager of a commercial movie theater in the Greenwich Village area of New York City. On July 29, 1969, a film called "Blue Movie" was exhibited there. The film depicts a nude couple engaged in ultimate sexual acts. Three police officers saw part of the film. Apparently on the basis of their observations, an assistant district attorney of New York County requested a judge of the New York Criminal Court to see a performance. On July 31, 1969, the judge, accompanied by a police inspector, purchased a ticket and saw the entire film. There were about 100 other persons in the audience. Neither the judge nor the police inspector recalled any signs restricting admission to adults.[1]

At the end of the film, the judge, without any discussions with the police inspector, signed a search warrant for the seizure of the film and three "John Doe" warrants for the arrest of the theater manager, the projectionist, and the ticket-taker, respectively. No one at the theater was notified or consulted prior to the issuance of the warrants. The judge signed the warrants because "it was, and is, my opinion that that film is obscene, and was obscene as I saw it then under the definition of obscene that is [in] . . . section 235.00 of the Penal Law." Exhibition of an obscene film violates New York Penal Law § 235.05.[2]

---

[1] The prosecution presented no evidence that juveniles were actually present in the theater.

---

[2] New York Penal Law § 235.05 reads in relevant part:

"A person is guilty of obscenity when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material; or

"2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

"Obscenity is a class A misdemeanor."

The terms used in § 235.05, *supra*, are defined by New York Penal Law § 235.00, which reads in relevant part:

"The following definitions are applicable to sections 235.05, 235.10 and 235.15:

"1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

"2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

"3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

"4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

The warrants were immediately executed by police officers. Three reels, comprising a single copy of the film, were seized. Petitioner, the theater manager, was arrested, as were the projectionist and the ticket-taker.[3] No pretrial motion was made for the return of the film or for its suppression as evidence. Nor did petitioner make a pretrial claim that seizure of the film prevented its exhibition by use of another copy, and the record does not conclusively indicate whether such a copy was available. On September 16, 1969, 47 days after his arrest and the seizure of the movie, petitioner came to trial, jury waived, before three judges of the New York City Criminal Court.

At trial, the prosecution's case rested almost solely on testimony concerning the arrests and the seizure of the film, together with the introduction into evidence of the seized film itself. The film was exhibited to the trial judges. The defense offered three "expert" witnesses: an author, a professor of sociology, and a newspaper writer. These witnesses testified that the film had social, literary and artistic importance in illustrating "a growing and important point of view about sexual behavior" as well as providing observations "about the political and social situation in this country today. . . ." Petitioner testified that the theater's employees were instructed not to admit persons who appeared to be under 18 years of age, unless they "had identification that they were eighteen." Petitioner also testified that there was a sign at the box office stating that "no one under 17 would be admitted." Both at the end of the prosecution's case and his own case, petitioner moved to dismiss the indictment on the grounds that the seizure of the film, without a prior adversary hearing, violated the Fourteenth Amendment.

---

[3] The cases against the ticket-taker and projectionist were dismissed on the motion of the prosecutor.

At the close of trial on September 17, 1969, petitioner was found guilty by all three judges of violating New York Penal Law § 235.05, *supra.* On appeal, both the Supreme Court of the State of New York, Appellate Term, and the Court of Appeals of the State of New York viewed the film and affirmed petitioner's conviction. The Court of Appeals, relying on this Court's opinion in *Lee Art Theatre* v. *Virginia,* 392 U. S. 636, 637 (1968), held that an adversary hearing was not required prior to seizure of the film, and that the judicial determination which occurred prior to seizure in this case was constitutionally sufficient. In so holding, the Court of Appeals explicitly disapproved, as going "beyond any requirement imposed on State courts by the Supreme Court," *Astro Cinema Corp.* v. *Mackell,* 422 F. 2d 293 (CA2 1970), and *Bethview Amusement Corp.* v. *Cahn,* 416 F. 2d 410 (CA2 1969), cert. denied, 397 U. S. 920 (1970), cases requiring an adversary hearing prior to any seizure of movie film. 29 N. Y. 2d 319, 323 (1971).

We affirm this holding of the Court of Appeals of the State of New York. This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. See *Times Film Corp.* v. *Chicago,* 365 U. S. 43 (1961); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 440-442 (1957). In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. In *Lee Art Theatre* v. *Virginia,* 392 U. S. 636 (1968), the Court went so far as to suggest that it was an open question whether a judge need "have viewed the motion picture before issuing the warrant." *Id.,* 392 U. S., at 637.[4] Here the judge viewed the entire film and, indeed, witnessed the alleged criminal act. It is not contested that the judge was a "neutral, detached magistrate," that he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to "focus searchingly on the question of obscenity." See *Marcus* v. *Search Warrant of Property,* 367 U. S. 717, 731–733 (1961). Cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449–453 (1971); *Giordenello* v. *United States,* 357 U. S. 480, 485–486 (1958); *Johnson* v. *United States,* 333 U. S. 10, 14–15 (1948).

---

[4] "It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture

In *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971), and *Freedman* v. *Maryland,* 380 U. S. 51 (1965), we held that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint.*" 402 U. S., at 367, quoting 380 U. S., at 58 (emphasis added). Those cases involved, respectively, seizure of imported materials by federal customs agents and state administrative licensing of motion pictures, both civil procedures directed at absolute suppression of the materials themselves. Even in those cases, we did not require that the adversary proceeding must take place prior to *initial* seizure. Rather, it was

---

there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' [*Marcus* v. *Search Warrant,* 367 U. S. 717], at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See *Freedman* v. *Maryland,* 380 U. S. 51, 58–59." *Lee Art Theatre* v. *Virginia, supra,* 292 U. S., at 637 (1968).

held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship."[5] *United States* v. *Thirty-Seven Photographs, supra,* 402 U. S., at 367 (1971); *Freedman* v. *Maryland, supra,* 380 U. S., at 57–59 (1965). See *Blount* v. *Rizzi,* 400 U. S. 410, 419–421 (1971); *Teitel Film Corp.* v. *Cusak,* 390 U. S. 139, 141–142 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70–71 (1963).

In this case, of course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed. Cf. *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363, 367 (1971); *Freedman* v. *Maryland,* 380 U. S. 51, 57–59 (1965). A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired.[6] Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant. See *United States* v. *Thirty-Seven Photographs, supra,* 402 U. S., at 373–374 (1971). In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial. Cf. *Kingsley Books, Inc.* v. *Brown, supra,* 354 U. S., at 439 (1957).

---

[5] We further held "(1) there must be assurance, 'by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film'; (2) '[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution'; and (3) 'the procedure must also assure a prompt final judicial decision' to minimize the impact of possibly erroneous administrative action. [*Freedman* v. *Maryland,* 380 U. S.], at 58–59." *United States* v. *Thirty-Seven Photographs, supra,* 402 U. S., at 367 (1971).

Petitioner's reliance on the Court's decisions in *a Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205 (1964), and *Marcus* v. *Search Warrants of Property,* 367 U. S. 717 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction,[7] and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *Quantity of Copies of Books* v. *Kansas, supra,* 378 U. S., at 213 (1964). We do not disturb this holding. Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *Quantity of Copies of Books* and *Marcus* are fully met. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971) quoting *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971). *Carrol* v. *Comm'rs of Princess Anne,* 393 U. S. 175, 181 (1968). See *Near* v. *Minnesota,* 283 U. S. 697 (1931).

---

[6] The State of New York has represented that it stands ready to grant "immediate" adversary hearings on pretrial motions challenging seizures of material arguably protected by the First Amendment. No such motion was made by petitioner.

[7] In particular, *Marcus* involved seizure of 11,000 copies of 280 publications by police officers acting pursuant to a general warrant. *Marcus* v. *Search Warrant of Property, supra,* 367 U. S., at 723 (1961). Unlike this case, there was no independent judicial determination of obscenity by a neutral, detached magistrate, nor were the seizures made to preserve evidence for a criminal prosecution. *Id.,* 367 U. S., at 732. The sole purpose was to seize the articles as contraband and to cause them "to be destroyed, by burning or otherwise." *Id.,* 367 U. S., at 721, n. 6. In *Quantity of Copies of Books* v. *Kansas, supra,* 1,715 copies of 31 publications were seized by a county sheriff, also without any prior judicial determination of obscenity and, again, for the sole purpose of destroying the publications as contraband. *Id.,* 378 U. S., at 206–209.

But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film.[a] If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt[9] judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding.[10] Otherwise, the film must be returned.[11]

---

[a] In *Mishkin* v. *New York,* 383 U. S. 502 (1966), this Court refused to review the legality of a seizure of books challenged under *A Quantity of Copies of Books, supra,* primarily because the record did not reveal the number of books seized as evidence under the warrant or "whether the books seized . . . were on the threshold of dissemination." 383 U. S., at 512—514. If *A Quantity of Books* applied to *all* seizures of obscene material, there would have been no need for the Court to abstain from review in *Mishkin,* since the parties had conceded that there was no prior adversary hearing. This is not to say that multiple copies of a single film may be seized as purely

With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll* v. *President and Comm'rs of Princess Anne,*

---

cumulative evidence, or that a State may circumvent *Marcus* or *A Quantity of Copies of Books* by incorporating, as an element of a criminal offense, the number of copies of the obscene materials involved.

[9] By "prompt," we mean the shortest period "compatible with sound judicial resolution." See *United States* v. *Thirty-Seven Photographs, supra,* 402 U. S., at 367 (1971); *Blount* v. *Rizzi, supra,* 400 U. S., at 417 (1971); *Freedman* v. *Maryland, supra,* 380 U. S., at 58–59 (1965).

[10] At oral argument, counsel for petitioner agreed that a prompt opportunity to obtain a copy from the seized film at "an independent lab under circumstances that would assure that there was no tampering with the film" with the original returned within "24 hours" would "satisfy" his "First Amendment position." Petitioner never requested such a copy below.

[11] Failure to permit copying of seized material adversely affects First Amendment interests; prompt copying of seized material should be permitted. If copying is denied, return of the seized material should be required. On the other hand, violations of Fourth Amendment standards would require that the seized material be excluded from evidence. See *Roaden* v. *Kentucky,* — U. S. — (1973), *Lee Art Theatre* v. *Virginia,* 392 U. S. 636, 637 (1968). Cf. *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

supra, 393 U. S., 175, 183–184 (1968). The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses. Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdiction, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film.

Petitioner also challenged his conviction on substantive, as opposed to procedural grounds, arguing that he was convicted under standards of obscenity both overbroad and unconstitutionally vague. In addition, petitioner argues that films shown only to consenting adults in private have a particular claim to constitutional protection. In *Miller* v. *California,* — U. S. — (1973), and *Paris Adult Theatre I* v. *Slaton,* — U. S. — (1973), decided June 21, 1973, we dealt with these substantive issues. A majority of this Court has now approved guidelines for the lawful state regulation of obscene materials. The judgment of the Court of Appeals of the State of New York is therefore vacated and this case remanded for the sole purpose of affording the New York courts an opportunity to reconsider these substantive issues in light of *Miller* and *Paris Adult Theatre I.* See *United States* v. *Twelve 200-Ft. Reels,* — U. S. — (p. 7, n. 7) (1973).

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

Nos. 71–1043 AND 71–1134

Saul Heller, Petitioner, 71–1043 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.
Harry Roaden, Petitioner, 71–1134 *v.* Commonwealth of Kentucky.	On Writ of Certiorari to the Court of Appeals of Kentucky.

[June 25, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I would grant and reverse outright in each of these cases as, in my view, the underlying obscenity statute violates the First Amendment for the reasons stated in my dissenting opinion in *Miller* v. *Californa, ante*, p. —, and in *United States* v. *12 200 Ft. Reels, ante*, p. —.

SUPREME COURT OF THE UNITED STATES

No. 71-1043

Saul Heller, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We granted certiorari to consider the holding of the Court of Appeals of New York that the Constitution does not require an adversary hearing on obscenity prior to a judge's issuance of warrants for the seizure of a film and for the arrest of the film's exhibitor. 29 N. Y. 2d 319, 277 N. E. 2d 651 (1971). The statute under which the prosecution was brought* is, in my view, unconstitutionally overbroad and therefore invalid on its face. See my dissent in *Paris Adult Theatre* v. *Slaton*, — U. S. — (1973). I would therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with my dissenting opinion in *Slaton*. In that circumstance, I have no occasion to consider whether, assuming that a prosecution could properly be brought, the seizure of the film at issue here was constitutional.

---

*N. Y. Penal Law § 235.05:

"A person is guilty of obscenity when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material; or

"2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity."